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A MANUAL OF ROMAN LAW

PRINTED BY
GREEN AND SON
EDINBURGH

January 1915

A MANUAL OF THE PRINCIPLES OF

ROMAN LAW

RELATING TO

PERSONS, PROPERTY, AND OBLIGATIONS

WITH A HISTORICAL INTRODUCTION

FOR THE USE OF STUDENTS

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138477
12/5-/16

EDINBURGH
W. GREEN & SON
LIMITED
LAW PUBLISHERS
1915

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PREFACE

THERE are already in existence so many works upon Roman Law of the highest erudition and authority that it seems necessary to offer some explanation of the appearance of the present volume. The purpose of this work is somewhat special. Far from seeking either to place itself alongside of, or to enter into rivalry with, the already recognised authorities upon the subject, it seeks rather to present the results of their critical erudition in a form and in terms free from technicalities, and to expound the main principles of the matured Roman Law relating specially to Persons, Property, and Obligations, but excluding the Law of Succession and Actions, in so far as these are the foundation of modern legal science, in a manner that does not involve as a pre-requisite a knowledge of the Latin language. In this respect the present work seeks to be an introduction to the study of law that will be available to the interested layman no less than to the would-be lawyer. By means of a succinct Historical Introduction, and throughout the text, it has been sought to indicate the course of the development of the Roman legal institutions and principles, a knowledge of which is essential to the true appreciation of any legal system.

This work has been prompted as the result of the experience obtained by the author during a number of years in lecturing to Egyptian students. The Egyptian Native Codes being based, in very large measure, upon the French Codes, a knowledge of the principles of Roman Law is essential to the student of law in Egypt, who, however, suffers from the disadvantage that he has no knowledge of the Latin language. While it is, therefore, impossible to expound the subject to him either directly or by way of commentary upon the Latin texts, it is, at the same time, necessary to present to the student, in language that will be readily understood, a statement of the main principles of the Roman Law in such a manner as will both compensate for his lack of a classical education and do fair justice to the subject. With this object in view, the subject is here expounded by a method of divisions and sub-divisions, each of which is, as far as possible, self-contained; on which account, indeed, there may appear to be, at times, somewhat of redundancy. For the sake of greater simplicity and clearness moreover,

particular terms and expressions have been emphasised, in general, by being put within inverted commas, and are frequently explained by exegetical synonyms; and as it has been impossible, of course, to avoid the use of a considerable number of Latin terms and expressions throughout the text, these are invariably either given in parentheses or explained by English equivalents,—all which which may appear somewhat superfluous to the ordinary British student.

Although this work is primarily designed to meet the requirements of the Egyptian student of law (hence the frequent references to the French Civil Code and to French authorities) and of persons having little or no classical knowledge, it is by no means exclusively so intended; and the author ventures to hope that it will be found useful to all students of Roman Law, whosoever or wheresoever they may be. With this object there is throughout a full citation of the Latin texts, and other authorities, and under each particular matter dealt with reference is given to the literature upon the topic that is most generally available to the student and suitable for his purposes. In this way, and also by means of explanatory interpolations in the text, by footnotes, and by frequent cross-references, it has been sought to make the path of the student, whoever he may be, both more easy and more interesting: with this end in view, moreover, there is appended a list of works likely to be of use to him—many of which are cited in the text, while others, although not actually referred to, yet cast valuable sidelights upon the study of the principles of the Roman Law, and are therefore recommended to the consideration of the more inquiring student.

R. D. M.

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PART I

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ROMAN LAW

PART I

CHAPTER I

HISTORICAL INTRODUCTION

Section I.—General

The importance of the Roman Law as a subject of legal education and study consists primarily in the fact that it is the foundation, in a greater or less degree, of the legal systems of most modern European countries, and particularly of the private law of France,[1] as well as of those systems prevailing in other regions of the world so geographically remote from each other as, for example, Canada and Ceylon, and British Guiana, South Africa and Louisiana. The Roman Law is, moreover, of the utmost educational value by reason of the fact that it is a highly developed treatment of law as a practical science reduced, in the course of a period of nearly a thousand years, after a continuous process of searching criticism and practical application, to a system of great general legal principles so comprehensive in their character as to be applicable or adaptable, in a large measure, to the complexities of modern civilised existence. What is known as the modern Roman Law is the adaptation and application of the principles of the Law of the *Digest* of Justinian to the complex conditions and the changing requirements of modern life: this modern Roman Law is specially identified with the French Codes which have influenced to a large, although varying, extent the modern development and application of the principles of the Roman Law, not only in Europe but in other parts of the World, such as in Egypt,[2] and even in Japan.[3]

The great system of the Roman Law, complex and highly developed as it became, was nevertheless one which had gradually evolved, in the long course of centuries, from the simplest and most primitive conditions,[4]

[1] *Cf.* May, *Éléments de Droit Romain*, 8th ed., 9.

[2] The Egyptian Codes, both Native and Mixed, are, in the main, copied from the French.

[3] The Japanese Code of 1896 shows marked French influence (see "Influence du droit civil français sur le Japon," in *Livre du Centenaire*, ii. 781-790).

[4] Upon the origin and early history of the Roman State see Ihne, *History of Rome*, i. 109; Mommsen, *History of Rome*, i. 50; Ortolan, *History of Roman Law*, 2-15; Muirhead, *Historical Introduction to the Private Law of Rome*, pt. i. ch. i.

and the course of its development exhibits "a panorama of legal development such as cannot be matched in the history of the laws of any other people."[1]

The universality of the application of the developed principles of the Roman Law may be said to account for its acceptance throughout Europe during the Middle Ages, and accounts for the fact that, at the present day, Europe is still largely governed by its rules and principles.

> Sir Henry Maine has described the Code Napoléon as "a compendium of the rules of Roman Law then practised in France, cleared of all feudal admixture—such rules, however, being in all cases taken with the extensions given to them, and the interpretations put upon them by one or two eminent French jurists, and particularly by Pothier."[2] This description applies equally to the Civil Code of Lower Canada, which "to a very considerable extent simply reproduces, in an abridged and abstract form, the conclusions reached by the Roman lawyers fifteen or sixteen hundred years ago."[3]

Apart from the general grounds upon which the value and importance of the Roman Law is based, there are other reasons which render its study specially valuable in modern times. These reasons have been well summarised by a recent writer as consisting of (1) its intrinsic merit as a luminous exposition of the application of general principles to varying groups of circumstances; (2) its value as an introduction to legal terminology and method; (3) its importance as an historical introduction to the French civil law; and (4) its value as a study of legal history.[4]

The same writer also rightly points out that the terms and classification of the Roman Law have been retained by the modern *Droit Civil*, and that the Roman Law tends to become the *lingua franca* of universal jurisprudence.

Although the Roman Empire has, long centuries since, ceased to exist as such, and has been long numbered with the other dead empires of the Past, nevertheless Ancient and Imperial Rome still speaks to the Modern World through her system of law and her legal institutions, and exercises in that way an influence that is very real, although indirect, upon its character and its destinies.

Section II.—Divisions of the History of Roman Law

It is convenient, for purposes of study, to divide the history of the Roman Law into certain great periods, each of which is supposed to possess some special and characteristic feature which distinguishes it

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[1] Hunter, *Introduction to Roman Law*, 6th ed., 1.

[2] Maine, *Village Communities*, 357.

[3] Walton, *Historical Introduction to the Roman Law*, 2nd ed., 4.

[4] Walton, *ibid.*, 11-12.

from the others. It must, however, be borne well in mind that such divisions in no way mark breaks in the continuous development of the law, but merely mark stages in a process which was continuous until the final disruption of the Empire.

The divisions of the subject are arbitrary, and different writers, for various reasons, adopt different arrangements.

Sohm[1] divides the history of Roman Law into two great periods: (1) the period of Local Law, which extends down to the last century of the Republic; (2) the period of Universal Law, which is the period of the Empire. The first period is marked by the prevalence of the so-called *Jus Civile*, which was the rigid, formal, national (*i.e.* Latin) law of Rome. The second period is marked by the prevalence of the so-called *Jus Gentium*, *i.e.* the equitable law, free from formalism, which sprang from the mutual interaction of Greek and Roman influences. This division is one which regards the development of the law in its purely scientific aspect.

Muirhead[2] divides the subject into five periods—namely, (1) the Regal period; (2) from the establishment of the Republic till the subjugation of Central and Southern Italy; (3) the latter half of the Republican period; (4) the period of the Empire until the time of Diocletian; (5) the period of the Empire from Diocletian to Justinian. This division contemplates the treatment of the history of the Roman Law in its social rather than its scientific aspects.

Mackenzie[3] makes a threefold division of the subject as follows:—(1) From the foundation of the city to the promulgation of the Twelve Tables; (2) from the Twelve Tables to the establishment of the Empire under Augustus; (3) from Augustus to Justinian.

Voigt[4] in his arrangement of the subject commences with the Twelve Tables, holding that prior to that point of time there are not proper or sufficient materials for historical purposes. His division is fourfold—(1) from the Twelve Tables to the *Lex Aebutia;* (2) from the *Lex Aebutia* (*circa* B.C. 149 to 126) to the commencement of the Empire under Augustus; (3) from Augustus to Diocletian; (4) from Diocletian to the death of Justinian.

Bruns[5] and Girard[6] adopt a fourfold division as follows:—(1) Period of the Kings (753 B.C. to 509 B.C.); (2) Period of the Republic (509 B.C. to 27 B.C.); (3) Period of the Principate or Constitutional Monarchy (27 B.C. to 284 A.D.); (4) Period of Absolute Monarchy (284 A.D. to 565 A.D.).

Karlowa[7] regards the Periods of the Kings and of the Republic as constituting together a single period, but otherwise his division is the same as that of Bruns and Girard.

Ortolan[8] divides the history of the Roman Law into three general

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[1] Sohm, *Institutes of Roman Law*, 3rd ed., pt. i. s. 10. See *ibid.*, p. 47.

[2] Muirhead, *Historical Introduction to the Private Law of Rome*, 2nd ed., 1899.

[3] Mackenzie, *Studies in Roman Law*, 3.

[4] Voigt, *Römische Rechtsgeschichte* (Leipsic, 1892), 5, 6.

[5] Bruns, *Geschichte und Quellen des Römischen Rechts.*

[6] Girard, *Manuel Élémentaire de Droit Romain*, 2nd ed., 1898 (5th ed., 1911).

[7] Karlowa, *Römische Rechtsgeschichte*, 1901.

[8] Ortolan, *History of Roman Law.*

periods—namely, those of (1) the Kings, (2) the Republic, (3) the Emperors. He also subdivides the Period of the Republic into three parts, namely—(1) to the Twelve Tables; (2) from the Twelve Tables to the conquest of all Italy; (3) from the subjugation of Italy to the Empire. He likewise subdivides the Period of the Emperors into three parts, namely—(1) from the establishment of the Empire to Constantine; (2) from Constantine to Justinian; (3) the reign of Justinian. He thereafter treats of the history of the Roman Law in the East and West after Justinian. He claims that this division is the one naturally suggested by the course of history,[1] but he states that the fourfold division adopted by Hugo in his *Histoire du Droit Romain*, was that followed with slight variations by Gibbon and succeeding writers;[2] this division was into periods of legal "infancy," "youth," "manhood" and "old age" respectively, and was as follows:—(1) from the foundation of Rome to the Twelve Tables; (2) from the Twelve Tables to the time of Cicero; (3) from Cicero to Alexander Severus; and (4) from Alexander Severus to Justinian.

I venture, for reasons that will be afterwards stated, to recommend the following general division, namely:—

PERIOD I. From the foundation of Rome to the promulgation of the Twelve Tables (753 B.C. to 449 B.C.).

PERIOD II. From the Twelve Tables to the end of the Republic (449 B.C. to 31 B.C.).

PERIOD III. From the establishment of the Empire under Augustus to the close of the reign of the Emperor Justinian (31 B.C. to 565 A.D.).

PERIOD IV. The History of Roman Law in Europe subsequent to the disruption of the Empires of the West and of the East respectively.

FIRST PERIOD

The First Period under the above arrangement comprises the whole of the early "regal" period of Rome's history, and also a portion of the period of the Republic. The Twelve Tables have been taken as the determining point of this period by reason of the fact that until the promulgation of the Twelve Tables the Law was unwritten and consisted, for the most part, of mere customary and traditional usages, largely of a religious character. This fact constitutes the distinctive characteristic of the First Period. The Twelve Tables may be said to have expressed for the first time in Rome's history, in a written form, the existing

[1] Ortolan, *History of Roman Law*, 440.

[2] Viz. by MacKeldey in the Historical Introduction to his *Manual of Roman Law;* by Girard in his *Introduction to the Study of Roman Law;* by Warnkoenig in his *History of Roman Law;* by Blondeau in the chronological table with which his translation of the *Institutes* is concluded.

unwritten customary rules which, in a primitive and simple community, such as Rome then was, pass as law.

The Twelve Tables are of importance rather as marking the advance from an unwritten to a written system of rules than as a system of law in itself, for the provisions of the Tables, so far as they are known,[1] are crude, formal, and inflexible, and unsuited to the requirements of a progressive community; and they mark the emergence of Rome from purely primitive conditions; at the same time they constitute the starting-point in the development of the Roman Law—"a development which, after steadily advancing in uninterrupted progression, finally culminated in the *Corpus Juris Civilis* of Justinian."[2]

The Twelve Tables are, further, important as marking an advance from purely religious custom to secular rule. They mark the transition from a system of *Fas* to a system of *Jus*, and their provisions are for the most part secular, religious rules being few and of secondary importance.[3] The exact distinction between *Fas* and *Jus* as understood in early Roman law is not clear, but it is generally considered to have consisted in the distinction between moral law and juristic law. *Fas* was law of divine origin, and *Jus* was law of human origin.[4]

Previous to the Twelve Tables the unwritten law and the sanctions attached to it had been, as is characteristic of early law in primitive communities, mainly of a religious or semi-religious character, and the knowledge of it had been the exclusive possession of the patrician priesthood. The promulgation of the Twelve Tables removed this exclusive knowledge, and gave a certain element of certainty to the law, and it at the same time emphasised the distinction early drawn by the Romans between the sphere of Law and that of Religion, to which the rapid development of the Roman legal institutions may be attributed. When the Monarchy was succeeded by the Republic the exclusive control of religious and spiritual matters was given to the College of Pontiffs or priests, while the control and administration of secular affairs was confided to those new magistrates who had been created to perform the secular functions formerly exercised by the Kings.

The publication of the Twelve Tables was the outcome of a long struggle during the early Republic between the two orders in the

[1] The remains of the Tables, so far as they have been discovered and reconstructed, are fragmentary and of doubtful authenticity. A couple of score or so are all that have been collected of their provisions in what profess to be the *ipsissima verba* of the Tables; and these are contained principally in the writings of Cicero, the *Noctes Atticae* of Aulus Gellius, and the treatise *De Verborum Significatione* of Verrius Flaccus, as epitomised by Festus. The original Tables are supposed to have been destroyed when Rome was sacked by the Gauls, but they were subsequently reproduced (Muirhead, 96-98 (*q.v.*)).

With regard to the substance of the Twelve Tables, see note at p. 8, *post.*

[2] Sohm, *Inst.*, 2nd ed., s. 10, p. 24.

[3] Muirhead, *Historical Introduction to the Law of Rome*, 2nd ed., 101.

[4] See *re Fas* and *Jus*, Muirhead, *Historical Introduction to Roman Law*, 15-21. *Cf.* Sohm, s. 7, p. 15, note 2 (p. 22, 3rd ed.).

Roman State. The Plebeians complained, amongst other grievances, of the uncertainty of the Law as affecting themselves, and of the fact that the administration of the Law was in the hands of the Patricians, who, possessing the exclusive knowledge of the unwritten rules of the Law, administered it in the interests of their own class, and with much harshness towards the Plebeians.[1]

In 462 B.C. the Tribune of the Plebs, C. Terentilius Arsa, proposed the appointment of a commission to prepare laws defining the jurisdiction of the Consuls, and to check arbitrary and oppressive administration of the Law. This proposal was at first violently opposed by the Patricians, and the Senate refused its assent, but after an acute controversy, continued for several years, a commission was finally appointed and took office in 451 B.C. charged with the duty of codifying the whole existing law so as to remove, as far as possible, the uncertainty which had hitherto prevailed as to its terms. The commissioners were ten in number, and are known in history as the "Decemvirs" (*decemviri legibus scribundis*). In 450 B.C. the results of their work were published upon ten bronze tablets, and set up in the Forum;[2] in the following year two supplementary tablets were added with the sanction of the Senate and the *Comitia Centuriata*, after the expulsion of the Decemvirs from office, which followed upon the second secession of the Plebeians.[3] It is uncertain to what extent the Twelve Tables constituted a complete codification of the existing customary law; it is now, however, considered as beyond dispute that, being intended as an exposition of the general civil law applicable to all classes alike, they did not regulate practices or institutions peculiar to either order, or matters of common knowledge which were not in dispute or in uncertainty; these remained "common" or customary law.[4] Thus a general knowledge was presumed of the institutions of the family, the fundamental rules of succession, the solemnities of such formal acts as mancipation, nexum, and testaments, and the main features of the order of judicial procedure, and the Decemvirs thought it unnecessary to define them.[5] "Nothing of the customary law, therefore, or next to nothing, was introduced into the Tables that

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[1] The harshness of the administration of the law was chiefly associated with the disposal of the public lands (*ager publicus*) and with the enforcement of the law of debt against defaulting debtors in connection with the transaction known as *nexum*, whereby a debtor pledged his person in security of his debt. The rights so created came in time to be abused to an intolerable degree. See, on these points, Muirhead, *Historical Introduction to Law of Rome*, 87-93.

[2] *Cf.* Sohm, *Inst.*, 50, s. 14 (3rd ed., s. 15, p. 76). The bronze tablets, erected in the Forum, representing the embodiment of the ancient strict *jus civile*, are in contrast with the white wooden tablets known as the *album*, on which in later times from year to year succeeding praetors prescribed the *formulae*, and which came to signify generally the Praetorian Edict, or that later equitable system of law which subsequently revolutionised where it did not supersede the old strict law.

[3] For the substance of the reconstructed fragments of the Twelve Tables, see Ortolan's *History of Roman Law*, 81-99, and 100-113, for a commentary upon it. Also see Hunter, *Roman Law*, 17-22, and note 1, 17, *ibid.*, for a summary of the most important literature upon the reconstruction of the Twelve Tables.

[4] Moyle, *Imperatoris Justiniani Institutiones*, 4th ed., 13.

[5] Muirhead, *Historical Introduction to Law of Rome*, 96.

was already universally recognised as law, and not complained of as either unequal, indefinite, defective, or oppressive."[1]

The belief in the foreign sources of the provisions of the Twelve Tables and of the dispatch of a mission to Greece for the purpose of collecting materials for the preparation of a code of law, which was formerly held by many historians, seems to be entirely without foundation, and it is now considered as conclusively established that the greater proportion of the decemviral legislation was native and original and the foreign influence was trifling in amount.[2]

Second Period

The Second Period of the history of the Roman Law—from the Twelve Tables to the end of the Republic (449 B.C. to 31 B.C.)—was that one in the course of which all the great Roman legal institutions and most of the chief sources of the Law were developed.

This period may, with advantage, be subdivided into two parts, the first extending from the establishment of the Republic to the subjugation of Central and Southern Italy,[3] and the second subdivision extending from the subjugation of Central and Southern Italy to the close of the Republican period of Roman history.[4]

The reason for the foregoing subdivision is that these two periods present distinct characteristics which differentiate them. Throughout the period included in the first subdivision the law and legal institutions were characterised by an excessive rigidity and formality. It was the period of the application of the purely personal law of the strict *jus civile* to those alone possessing the privilege of Roman citizenship, and all proceedings were founded upon the terms of the Twelve Tables and the pontifical "interpretation"[5] of their provisions. It was during this period that the letter of the law and the forms in which it was couched were all-important, the intention counting for little.

The characteristic feature of the period included within the second subdivision is that the law ceased to be purely personal and became territorial in its application, owing to its expansion at the hands of the Praetors through their development and application of the equitable principles of the *jus gentium* applicable equally to both Roman citizens and non-citizens.

Third Period

The Third Period in the history of the Roman Law—from the establishment of the Empire under Augustus to the close of the reign of the Emperor Justinian (31 B.C. to 565 A.D.)—is that period during

[1] Muirhead, *Historical Introduction to Law of Rome*, 96.

[2] See upon this question, Moyle, *Institutes of Justinian*, 4th ed., 12; Muirhead, *Historical Introduction to Law of Rome*, 2nd ed., 95; Voigt, *Die XII. Tafeln*, i. 11 *et seq.*; Cuq, *Institutions Juridiques des Romains*, i. 133-137.

[3] *I.e.* the middle of the third century B.C.

[4] This subdivision corresponds to divisions (2) and (3) of Muirhead's arrangement, *ante*, p. 5.

[5] See Section VIII. upon "Interpretation" as a means of development of the Law.

which Rome not only attained the zenith of her greatness and her glory as a State but her legal institutions also attained their highest point of development and of consolidation.

The Third, or "Imperial" Period, according to the general arrangement already recommended,[1] may, like the Second Period, be subdivided into two periods, namely, that of the "Early" and that of the "Later" Empire, as both of these periods are distinguished from each other by special characteristic features. The Early Empire period may be taken as extending from Augustus to Diocletian (31 B.C. to 284 A.D.), and the Later Empire period from Diocletian to the death of Justinian (284 A.D. to 565 A.D.).[2]

The Early Empire period may be regarded as a period of limited and, outwardly, constitutional monarchy in contradistinction to the absolute monarchy of the Later Empire. It was not until the reign of the Emperor Diocletian that the authority of the Roman Emperors became openly absolute and despotic; until the reign of Diocletian the Emperor was in theory rather the "chief citizen" (*Princeps*) of the State; his authority was limited by certain legal and constitutional checks, and he exercised his powers through the constitutional forms of the Republic.[3]

> The Consuls, Praetors, Tribunes, and other high magistrates with titles and functions of republican origin continued to be elected throughout the period of the Early Empire under the outward constitutional forms of the Republic, but their offices steadily continued to lose their importance and authority in direct proportion as the Senate gradually superseded the various *Comitia* as the representative popular body, and as all State and legislative authority came to be centralised in the hands and person of the Emperor.[4]
>
> In course of time the republican magisterial offices came merely to confer and to infer high social status and dignity without any actual authority, and the holders became merely the nominees of the Emperor. The authority of the Senate, moreover, having gradually superseded that of the *Comitia* as the popular legislative body, was itself, in time, superseded by the authority of the Emperor. The confirmation by the Senate of preceding deliberations in the Council of the Emperor[5] having been reduced to a mere formality was, by the time of the Emperor Alexander Severus (222 A.D. to 235 A.D.), entirely dispensed with.

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[1] *Ante*, p. 6.

[2] This subdivision makes the division here recommended correspond to the general arrangement followed by Puchta in the historical introduction to his study of the *Institutes*, 10th ed., 1893.

[3] See, on the title of *Princeps*, Pelham, *Essays on Roman History*, 49 *et seq.*

[4] *Cf.* Moyle, *Institutes of Justinian*, 46; Hunter, *Roman Law*, 4th ed., 65 *et seq.*

[5] The Imperial Council usually included amongst its members not only men eminent and experienced in public affairs but also men distinguished as jurists and lawyers, and as having formerly held high office under the Emperor.

The authority of the various republican magistrates elected originally by the *Comitia* and subsequently, during the Early Empire, by the Senate, was still further undermined or transformed by the creation of various new offices, the occupants of which were appointed by, dependent upon, and responsible solely to the Emperor. Notable amongst such new offices were those of the City Prefect (*praefectus urbi*) and of the Praetorian Prefect (*praefectus praetorio*).[1] Those two offices, from being originally semi-military and military, in course of time entirely changed their character and came to involve the exercise of the highest judicial functions in the State, superseding the authority of the Praetors, whose functions thereafter became practically those of Aediles, except with regard to certain special matters.[2] The nature of the transformation of the mode of the administration of the law in Imperial times is thus summarised by Sohm:[3]—"From the reign of Diocletian the administration of the law in Rome was also formally transferred from the Praetor to an Imperial functionary, the *praefectus urbi*. In the provinces the old distinction between senatorial and Imperial provinces was abolished, and the *praesides provinciarum* were at the same time turned into Imperial governors. Over them stood the *praefecti praetorio* with their substitutes, all of whom likewise exercised jurisdiction in the name of the Emperor. The republican forms and magistracies were thus finally displaced by the monarchy with its system of dependent officials."[4]

The period of the Early Empire was essentially one of growth and development; during that period the Roman Law grew to its highest point of perfection as a system of scientific jurisprudence,[5] and in the course of that period, moreover, lived all of those great juristic writers who are known as the "classical jurists"—Julian,[6] Pomponius,[7] Gaius,[8] Papinian,[9] Ulpian,[10] Paul,[11] and Modestinus,[12]—from whose writings the

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[1] Amongst such new offices, besides that of *praefectus urbi* and *praefectus praetorio* were those of the *legati Caesaris*, the *procuratores Caesaris*, the *quaestores candidati principis*, the *praefectus annonarum*, and the *praefectus vigilum* (Ortolan, *History of Roman Law*, 221).

[2] *E.g.*, the decision of questions relating to trust estates (*prætor de fideicommissis*); the determination of questions between private persons and the fisc; the regulation of the affairs of minors (*praetor tutelaris*).

[3] Sohm, *Institutes of Roman Law*, 220, 221 (*cf.* 3rd ed., 297).

[4] See with regard to the offices of the "city" and "praetorian" prefects, Hunter, *Roman Law*, 70-72; Ortolan, *History of Roman Law*, 222, 223, 311; *Dig.* i. 11, 12; Munro, *Digest of Justinian*, vol. i. 45-48.

[5] See Muirhead, *History of Roman Law*, pt. iv. ch. 1, 279 *et seq.*

[6] P. Salvius Julianus.

[7] Sextus Pomponius.

[8] Gaius ———. This is a praenomen; his cognomen is unknown. (See Poste, Gaius' *Institutes*, Introduction, 53, s. 21; Muirhead, *Institutes of Gaius*, Introduction.)

[9] Aemilius Papinianus.

[10] Domitius Ulpianus.

[11] Julius Paulus.

[12] Herennius Modestinus.

Digest and the *Institutes* of Justinian are mainly composed.[1] All of these so-called "classical" jurists lived within the period commencing with the reign of the Emperor Trajan (98 A.D. to 117 A.D.) and ending about the middle of the third century A.D. With Modestinus the development of the Roman Law by means of authoritative juristic interpretation rather abruptly terminated, owing, it is supposed, to the fact that about that time the Emperors discontinued the practice of granting the *jus respondendi*;[2] and thereafter the development of the law proceeded mainly through Imperial "Constitutions." As distinguished from the period of the Early Empire that of the Later Empire was essentially one of maturity and consolidation.

Section III.—Consolidation of the Roman Law by the Emperor Justinian

Towards the close of the period of the Later Empire all the law in use and force throughout the Roman world was, by order of the Emperor Justinian, who reigned from 527 A.D. to 565 A.D., collected from a great number of scattered or conflicting sources, and, by the labours of a number of jurists specially commissioned by the Emperor for the purpose, under the direction of Tribonian, the Quaestor of the Imperial Palace, was examined and analysed; what was obsolete was discarded, inconsistencies were remedied, and the final result of their labours was afterwards promulgated with Imperial authority as the existing and only binding law. This collection of the Roman Law is now universally known by the name of the *Corpus Juris Civilis*,[3] or the whole body of the civil law of Rome, and it marks the culminating point in the development of the Roman legal system.[4] Justinian's

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[1] The writings of Ulpian and Paul compose more than one-half of Justinian's *Digest*. See, for a short biographical sketch of the classical jurists, Walton, *Historical Introduction to the Roman Law*, 2nd ed., ch. xxv. 283 *et seq.* See also Hunter, *Roman Law*, 77, 78, and Clark, *History of Roman Private Law*, pt. i. s. 6 (p. 97 *et seq.*). For an excellent list of the most distinguished jurists referred to or quoted in the *Digest*, including the classical jurists, arranged in chronological order according to the particular reigns or epochs to which they respectively pertain, see Roby, *Roman Private Law in the Times of Cicero and of the Antonines*, i. 15.

[2] See *post*, Section VIII., p. 36.

[3] This name was first given to Justinian's entire collection by Denys Gothofredus in his complete edition of 1583, without the *glossae;* and it was applied in order to distinguish the collection from the compilation of the Canon Law known as the *Corpus Juris Canonici*. *Cf.* Ortolan, *History of Roman Law*, 374; Sohm, *Institutes of Roman Law*, 3rd ed., s. 6, p. 22; Muirhead, *Roman Law*, 2nd ed., 407.

[4] "Justinian's *Corpus Juris* summed up the results of that continuous development which had commenced centuries ago with the Twelve Tables, and the Twelve

collection superseded, by express Imperial declaration, upon its publication, all preceding codes of Roman Law, notably those known as the Gregorian, Hermogenian, and Theodosian Codes, and for centuries thereafter the civil law of Rome, in the final form of the *Corpus Juris Civilis*, was practically the common law of Europe. It is, moreover, in the form of Justinian's collection that the Roman Law is universally studied in modern times, and its provisions, for the most part, constitute the basis of modern law.

The Gregorian, Hermogenian, and Theodosian Codes were collections of Imperial Constitutions extending altogether over a period of two and a half centuries. The Gregorian Code (*Codex Gregorianus*) was, for the most part, a collection of Imperial "rescripts" from the time of Hadrian up to about 284 A.D., and principally those of the Emperor Septimius Severus and his successors. It is supposed to have been published about 295 A.D., and in its arrangement it followed that of the current commentaries upon the Edict. The Hermogenian Code (*Codex Hermogenianus*) was practically a supplement to the Gregorian Code, and was composed mainly of Constitutions issued under the Emperors Diocletian and Maximian (284 A.D. to 305 A.D.). Seven Constitutions of the Emperors Valens and Valentinian (364 A.D. to 365 A.D.) have also been supposed to pertain originally to this collection,[1] which would date its composition between 365 A.D. and 398 A.D.; but it is more generally considered that this is erroneous.

Both the Gregorian and Hermogenian Codes were, so far as is known, private compilations—which have come down to us incomplete—prepared by two jurists by whose names they are respectively known; they possessed no Imperial or legislative authority, but they received statutory recognition from Theodosius and Valentinian in their Commission for the preparation of a Collection of Edictal Law,[2] and they were in constant use in the Courts both in the East and in the West, only losing their importance through being absorbed in and superseded by Justinian's own Collection.

The Theodosian Code was a collection of Imperial constitutions, prepared by direction of Theodosius II., Emperor of the East, in 438 A.D., and promulgated simultaneously in the East and in the West in the names of Theodosius II. and of Valentinian III. respectively. This collection contained Imperial Constitutions from the time of Constantine I. until its own date. The series of separate Imperial "Constitutions" issued between the publication of the Theodosian Code and the fall of the Western Empire is known as the "Post-Theodosian Novels," in contra-

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Tables themselves, with all that followed them were now superseded by the great Imperial Code of Justinian" (Sohm, *Inst.* 81, s. 16; 3rd ed., p. 114).

[1] Upon the authority of the *Consultatio Veteris Jurisconsulti.* (Ortolan, *History of Roman Law*, 305).

[2] Muirhead, *History of Roman Law*, 366, 367.

distinction to the better known *Novels* (*Novellae Constitutiones*) of the *Corpus Juris Civilis*.[1]

The object of Justinian's Collection was to reduce within reasonable and intelligible dimensions and to consolidate the vast and frequently conflicting mass of law that had accumulated during many centuries in the course of the development of the system at the hands of the Praetor, the jurists, and the various legislative authorities.[2] Justinian's great Codification of the Roman Law is made up, in its final form, of four parts, each different in character, and published at different times, known respectively as (1) the *Digest* (or *Pandects*); (2) the *Institutes;* (3) the *Code;* (4) the *Novels.*

The *Digest* was a collection of and a selection from the writings of eminent jurists compiled within the space of three years by a commission of sixteen lawyers under the direction of Tribonian, Quaestor of the Imperial Palace. The arrangement of the subject-matter of the *Digest* follows, in the main, that of the "Perpetual Edict."[3] The *Digest* was published as authoritative law on 30th December 533 A.D.[4]

The *Institutes* were intended to be a short exposition of the Justinianian law, treated partly historically and partly theoretically, and suitable as an elementary text-book for the use of students, and as an introduction to the larger system of the *Digest* and the *Code*, and to the study of law generally. The *Institutes* were composed by a commission of three, consisting of Tribonian, assisted by two professors of law named Theophilus and Dorotheus; they are founded upon earlier institutional treatises, such as those of Ulpian and Marcian, but principally upon the *Institutes* of the jurist Gaius,[5] modified, however,

[1] Upon the "Gregorian," "Hermogenian," and "Theodosian" Codes see Muirhead, *History of Roman Law*, 366-9; Moyle, *Institutes of Justinian*, 69, 70; Ortolan, *History of Roman Law*, 302 *et seq.*; Sohm, *Institutes of Roman Law*, 86, 87 (3rd ed., 120); Girard, *Manuel de Droit Romain*, 71, 72 (5th ed., 74). The old French law is based upon these pre-Justinianian Codes. This is accounted for by the fact that between the reign of Theodosius and that of Justinian Gaul had been overrun by the barbarians—Franks, Burgundians, and Visigoths—and had ceased to be a Roman province. The Roman Law retained its hold and influence, however, throughout the conquered region in the form chiefly of the Theodosian Code. Prior to the publication of that Code the Roman Law prevailed throughout Gaul in the form of the Gregorian and Hermogenian Codes, the *Institutes* of Gaius, and the "Sentences" of Paul.

[2] See Muirhead, *Roman Law*, 378.

[3] *Cf.* Sohm, *Institutes of Roman Law*, 88 (3rd ed., s. 122). *Re* the "Perpetual Edict" see *post*, p. 27.

[4] On the Digest generally, see Ortolan, *History of Roman Law*, 355-363; Muirhead, *Roman Law*, 379-381; Sohm, *Institutes of Roman Law*, 88, s. 17 (3rd ed., s. 21, p. 122); also see s. 6, pp. 19, 20; Munro, *Digest of Justinian*, vols. i. and ii. (1904 and 1909).

[5] Gaius' *Institutes* had for long been the recognised introductory text-book in the law schools. It is a singular fact that nothing whatever is known of Gaius personally beyond his praenomen. From internal evidence in his writings he is supposed to

so far as changes had been operated or parts had become obsolete in the period of over three hundred years that elapsed between the time when Gaius wrote his treatise and Justinian published his *Institutes*. The *Institutes* were published on 21st November 533 A.D., and on their publication received the same statutory authority as the other parts of Justinian's Codification.[1] The *Code* was a collection of Imperial "Constitutions" dating from the reign of Hadrian (117 A.D. to 138 A.D.) to that of the Emperor Justinian (527 A.D.); it was published in 534 A.D., the year following that of the publication of the *Digest* and the *Institutes*.[2]

The *Novels* is the name given to the Imperial "Constitutions," making changes upon the law, issued between the time of the publication of the *Code* and the end of the reign of Justinian; they are thus, in fact, a supplementary portion of the *Code*. They were published some time after the death of Justinian in 365 A.D., and are usually supposed to number about 168.[3]

The name *Novels* is a contraction for *Novellae Constitutiones* or "new decrees." The *Novels* are written partly in Latin and partly in Greek; the most important of them are those which relate to the reform of the law of intestate succession.

Codex Vetus and Quinquaginta Decisiones.—Two other works of Justinian are sometimes regarded as forming part of the *Corpus Juris Civilis;* these are known as the *Codex Vetus* or the "Old Code," and the *Quinquaginta Decisiones*, or the "Fifty Decisions" respectively.

The *Codex Vetus* was a collection of Imperial Constitutions, based upon the Gregorian, Hermogenian, and Theodosian Codes, and including the Constitutions issued since 439 A.D., when the Theodosian Code came into operation. The work was executed by a commission of ten members in about a year, and came into effect as binding law on 16th April 529 A.D. under the name of the *Codex Justinianius*. It superseded, by express Imperial declaration, all the earlier Codes and Constitutions, reference to which thereafter was forbidden, and it was declared to constitute the sole repertory of statute law throughout the Roman Empire.

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have lived in the reign of Antoninus Pius and Marcus Aurelius, and to have lived till at least 178 A.D. His *Institutes* are thought to have been published about 161 A.D. The manuscript of Gaius' *Institutes* was only discovered in the year 1816. See, with regard to Gaius and his standing as a jurist, Muirhead, *Roman Law*, 301 *et seq.*; Poste, *Institutes of Gaius*, 4th ed., Introduction, liii. s. 21; Walton, *Historical Introduction to the Roman Law*, 143 (2nd ed., 286) *et seq.*

[1] Upon the *Institutes* generally, and their composition, see Muirhead, *ut supra*, 380; Ortolan, *ut supra*, 364; Sohm, *ut supra*, 87, s. 17 (3rd ed., 122).

[2] Upon the *Code* see Muirhead, *ut supra*, 385; Ortolan, *ut supra*, 365; Sohm, *ut supra*, 90, s. 17 (3rd ed., pp. 20 and 124).

[3] Upon the *Novels* see Muirhead, *ut supra*, 386; Mackenzie, *Roman Law*, 30; Sohm, *Institutes of Roman Law*, 11 (3rd ed., 21, 125); Ortolan, *ut supra*, 366 *et seq.*; Walton, *ut supra*, 160 *et seq.* (2nd ed., 304). The *Novels* subsequently came to be known by the name of *Authenticae* (Ortolan, 371).

The *Codex Vetus* was, however, subsequently superseded by and incorporated in the later *Code* published in 534 A.D., which, at the same time, also incorporated the "Fifty Decisions." The later *Code* was distinguished from the earlier one of 529 A.D. by the name of *Codex Repetitae Praelectionis.*[1]

The *Quinquaginta Decisiones*, or "Fifty Decisions," was a series of enactments issued by the Emperor Justinian between the years 529 A.D. and 532 A.D. which were intended to settle disputed points of law upon which there were conflicting opinions in the writings of the jurists. The necessity for the decision of such points arose at the outset of the preparation of the *Digest.* The "Fifty Decisions," though originally forming a separate collection, were subsequently incorporated in the second Code of 534 A.D.[2]

In the Later Empire the whole of the Roman Law had come to be made up of two great parts known respectively as the *Jus Vetus* and the *Jus Novum.* The *jus vetus* consisted of the writings and commentaries of the old jurists upon the various earlier sources of the law. The earlier law (*jus*) in the form of the Twelve Tables, *plebiscita, senatus-consulta*, and the Constitutions of the early Emperors, had come to be only intelligible and available in the form of the writings of the jurists, so that the "old law" —the *jus vetus*—became identified in the Later Empire with jurisprudential or jurist-made law as distinguished from the statute law (*leges*) of the Later Empire known as the *Jus Novum* or "new law."[3] The *Corpus Juris Civilis* is thus a twofold collection; it is composed of (1) the old law as expressed in the writings of the classical jurists, and (2) the new statute law as expressed in the legislation of the later Emperors. It was in this double aspect that the whole law presented itself in the time of Justinian.

The old law (*jus vetus*) was codified in the *Digest*, to which the *Institutes* were merely an abridged introduction, and the new law (*jus novum*) or later Imperial legislation was collated, in the *Code*, to which the *Novels* were merely supplementary. Justinian's codification may thus be said to really consist of only two parts, namely, the *Digest* and the *Code*, which codify respectively the jurisprudential law and the statutory law, or the *jus vetus* and the *jus novum*, which were, in later Imperial times, the two great component parts of the Roman Law.[4]

The *Institutes* and the *Novels* were merely secondary portions of these great divisions.

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[1] See upon the *Codex Vetus*, Muirhead, *Roman Law*, 377; Moyle, *Institutes of Justinian*, 73; Mackenzie, *Roman Law*, 25; Ortolan, *History of Roman Law*, 352; Hunter, *Roman Law*, 90; Girard, *Manuel de Droit Romain*, 74 (5th ed., 78).

[2] Upon the *Quinquaginta Decisiones* see Muirhead, *ut supra*, 379; Moyle, *ut supra*, 73; Hunter, *ut supra*, 90; Girard, *ut supra*, 75 (78).

[3] *Cf.* Muirhead, *Roman Law*, 378; Sohm, *Institutes of Roman Law*, 84, s. 17 (3rd ed., s. 21); Mackenzie, *Roman Law*, 25, note 2; Walton, *Introduction to Roman Law*, 163 (2nd ed., 307).

[4] "The *Digest* and *Code* are not scientific treatises on law but ordered collections of decisions, with more or less reasoning, on the acts and position, real or assumed, of certain classes of persons in family or business relations" (Roby, *Roman Private Law*, i. xi. xii. (Preface)).

The *Corpus Juris Civilis* represents a great uniform body or system of law, although it is composed of several separate books independently prepared and published, and each of which, on publication, received separate statutory authority.[1]

Section IV.—Original Sources of Roman Law

The Roman Law (*jus civile*) was, according to Justinian, composed of two main divisions, namely, the unwritten law (*jus non scriptum*) and the written law (*jus scriptum*).[2] "Written law" was, in the sense employed by Justinian, law which was embodied in a written form at its origination, even though the law so embodied might merely give written expression to immemorial custom.[3] "Unwritten law" was, on the other hand, traditional and immemorial custom or usage, deriving its validity and binding effect from the sanction attached to its age and invariability, but which had never been expressed in a written form.[4]

The "written law," or *jus scriptum*, was derived from six separate sources, namely, *leges*, *plebiscita*, *senatus-consulta*, *principum placita*, *edicta magistratuum*, and *responsa prudentium*.[5]

There were thus seven sources altogether from which, at different times, the Roman Law was derived. The relative importance of these various sources differed in degree at various epochs. Thus the importance of *plebiscita*[6] as sources of the law pertains to the period of the Republic, when the resolutions of the popular assemblies—the different *Comitia*—alone constituted statute law (*lex*); *edicta magistratuum*[7] are also referable, in special importance, to that period. *Senatus-consulta*[8] were of principal importance as sources of the law during the Early Empire, until which time they did not possess the definite character

[1] The sources and materials available in the time of Justinian for the construction of the *Corpus Juris Civilis* were (1) the writings of the jurists—the *jus vetus*—as determined by Valentinian's *Law of Citations* (*q.v.*, *post*, p. 42); (2) the earlier Imperial legislation, as contained in the Gregorian and Hermogenian Codes; and (3) the Theodosian Code and its supplementary *Novels*. *Cf.* Sohm, *Institutes of Roman Law*, 87 (3rd ed., 121).

[2] Justinian, *Inst.* i. 2, 3.

[3] *Cf.* Moyle, *Institutes of Justinian*, 101, s. 3.

[4] Justinian, *Inst.* i. 2, 9. Besides the purely national customary law of Rome (*mores majorum*) the term *jus non scriptum* originally embraced the whole of the *jus gentium*, and subsequently such parts of it as did not become "written" law (*jus scriptum*), by being worked into the Edict or other legislation (Moyle, *Inst.* 106, s. 9).

[5] Justinian, *Inst.* i. 2, 3; Gaius, *Inst.* i. 2.

[6] See p. 21.

[7] See p. 23.

[8] See p. 21.

of *leges* or statute law; after that time, however, they superseded *plebiscita*. *Responsa prudentium*[1] and *principum placita*[2] as sources of the law pertain to the Imperial period, the former to that of the Early Empire, and the latter to both the Early and the Later Empires, but specially to the later Imperial period.

Leges, Plebiscita, Senatus-Consulta

A *lex* (plural *leges*) was a law or statute enacted by the whole Roman people (*populus Romanus*) — which included patricians and plebeians alike—upon the proposal of a senatorial magistrate such as the Consul.[3]

Leges were originally passed in the *Comitia Curiata*, and subsequently the term was also, and more frequently, applied to resolutions or enactments of the Assembly of the Centuries (*Comitia Centuriata*). After the passing of the "Hortensian" law (*lex Hortensia*) the term *lex* was also frequently applied to resolutions of the purely plebeian assembly, the *Concilium Plebis*.[4]

A Plebiscitum (plural, *plebiscita*) was that which was enacted by the *plebs*, which term included all those Roman citizens who were neither patricians nor senators.[5]

A Senatus-Consultum (plural *senatus-consulta*) was a resolution or enactment of the Roman Senate.[6]

The "Roman people" (*populus Romanus*) originally consisted only of the patricians,[7] but after the "Servian Reforms" the term included both patricians and plebeians,[8] and *leges*, in the strict sense of enactments of the whole Roman people, came to signify, during the Republican period, resolutions or statutory enactments of the two

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[1] See Section VIII., *post*, p. 34.

[2] See *post*, p. 22.

[3] Justinian, *Inst.* i. 2, 4; Gaius, *Inst.* i. 3. A *lex* is sometimes styled by the commentators *populiscitum* in order to emphasise the distinction between a resolution of the whole people (*populus*) and one of the *plebs* alone, which was specially known as a *plebiscitum* (*q.v.*). The word *lex* was also used by the jurists to signify not only a comitial enactment, but also as meaning an obligation, or a restriction, or condition, or declaration, or such like, expressly incorporated in a private deed, as in the expression *lex contractus* or *lex testamenti*. A further later juristic use of the word *lex* was to signify an Imperial constitution (see Muirhead, *Roman Law*, 19, note 8).

[4] See "The Roman Comitia," p. 19.

[5] Justinian, *Inst.* i. 2, 4.

[6] Justinian, *Inst.* i. 2, 5; Gaius, *Inst.* i. 5; see, further, on *Senatus-Consulta*, at p. 21.

[7] *Cf.* Hunter, *Roman Law*, 4.

[8] Hunter, *ibid.*, 9.

popular assemblies known, respectively, as the *Comitia Centuriata* and the *Comitia Tributa*, which were essentially, by reason of their composition, assemblies of the whole Roman people. For long, however, the approval (*auctoritas*) of the Senate was requisite in order to legalise and render effective as law the resolutions of these constitutional bodies.

The resolutions of the purely plebeian assembly known as the *Concilium Plebis*,[1] or "Council of the Plebeians," only bound the plebeians themselves, and did not constitute law binding upon the whole Roman people, without the approval (*auctoritas*) of the Senate, until the passing of the Hortensian law (*lex Hortensia*) in 287 B.C. After that date, however, resolutions of the plebeian assembly, under the name of *plebiscita*, had the full effect of *leges* or statutes binding upon the whole people.[2] Prior to the passing of the *lex Hortensia* it had already been sought to give statutory effect, and the force of *leges*, to the enactments of the plebeian assembly—the *Concilium Plebis*—by means of the *lex Valeria Horatia* in 449 B.C., and the *lex Publilia* in 339 B.C.

The Roman Comitia

There were, during the period of the Republic, four different kinds of legislative assemblies or *Comitia* amongst the Romans: these were the *Comitia Curiata*, *Comitia Centuriata*, *Comitia Tributa*, and *Concilium Plebis*. The earliest of these bodies was the *Comitia Curiata*, which was based upon the early division of the Roman people into *curiae* or parishes, and was a purely patrician organisation.[3] By the commencement of the period of the Republic the *Comitia Curiata* had ceased to be of real importance as a legislative assembly, and its functions had come to be confined to the performance of certain formal acts, such as the passing of the *lex curiata*, which vested the higher magistrates with their *imperium* or supreme secular authority, and in connection with the constitution of the family, the execution of wills, and ceremony of adoption.[4] The true popular legislative assemblies during the historical period were those of the *populus* and of the *plebs*, represented by the *Comitia Centuriata* and the *Comitia Tributa* and by the *Concilium Plebis* respectively.

The Comitia Centuriata was an assembly of the whole Roman *populus* or people, including both patricians and plebeians, based upon a division of the people into classes according to the value of their property. This division is ascribed to Servius Tullius, the sixth King of Rome, and was essentially a military organisation so constituted for

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[1] See *post*, p. 21.

[2] *Dig.* i. 2. 2, 8; Gaius, *Inst.* i. 3.

[3] See upon contrary view, Muirhead, *Roman Law*, 2nd ed., 48, note 15; and authorities cited *ibid.*

[4] *Cf.* Ortolan, *History of Roman Law*, 52.

purposes of taxation; the division of the people into classes according to the value of their property was because it was upon that principle that the various forms of military service were originally determined. The different classes voted collectively, and the *centuria* or military unit was also that employed for voting purposes. Each "century," voting collectively, had only one vote, which was determined by the wishes of the majority of its members; but since the number of centuries in the higher classes considerably exceeded those in the lower classes, the great preponderance of voting power was in the hands of the richer classes.[1] The *Comitia Centuriata* superseded the earlier *Comitia Curiata* in political importance and legislative authority. In the later Republic, however, the functions of the *Comitia Centuriata* came to be confined to the election of the higher magistrates possessing the *imperium*, the determination of matters affecting the Constitution or of great public importance, such as making war or peace, and to acting as a final court of appeal in capital cases; it ceased to meet as a regular legislative body, its functions in that respect being ultimately usurped by the other popular assemblies, the *Comitia Tributa* and the *Concilium Plebis*.

The COMITIA TRIBUTA was an assembly of the whole Roman people (*populus*), based upon a territorial division of the whole people into local "tribes" (*tribus*) upon the model of the division of the *plebs* for voting purposes in the peculiarly plebeian assembly known as the *Concilium Plebis*. It is uncertain when the *Comitia Tributa* originated, but it is supposed to have been about the same time as the organisation of the Plebs in their *concilium* upon a "tribal" basis, which is generally attributed to a *plebiscitum* at the instance of Publilius Volero in 471 B.C.[2] The importance of the *Comitia Tributa* as a legislative body, however, is attributable to a period much posterior to that of its origination, and the first evidence for it as a legislative assembly pertains to the year 357 B.C.[3]

The *Comitia Tributa* was convoked by a magistrate possessing the *imperium*, such as a Consul or a Praetor, and it voted by tribes (*tributim*). Its original functions are thought to have been the election of the lesser magistrates, and to act as a court of appeal in non-capital cases, but its functions had come to be extended by 357 B.C. to those of legislation, and during the later Republic it was the most important and active of the various legislative assemblies.

The legislative enactments of the *Comitia Tributa* possessed the character of *leges*, but until the *lex Publilia Philonis* (339 B.C.) they required

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[1] The preponderance was counteracted by a reorganisation of the *Comitia Centuriata* upon a tribal basis. The date of this change cannot be fixed with certainty, but it is conjectured to have been about 241 B.C., when the number of tribes was increased to thirty-five, for the reorganised *Comitia* assumes the existence of that number of tribes. Under the rearrangement there was a total of 373 centuries as compared with 193 under the old organisation.

[2] Mommsen attributes the origin of the *Comitia Tributa* to the "Valerio-Horatian" laws of 449 B.C., but the preponderance of opinion is in favour of the earlier date. See Muirhead, *Roman Law*, 82; and Cuq, *Les Institutions Juridiques des Romains*, i. 22.

[3] Poste, *Institutes of Gaius*, 4th ed., Introduction, xxviii.; Livy, vii. 16.

the *auctoritas* or approval of the Senate; after that statute, however this was a purely formal act, which, moreover, was given in advance.

The CONCILIUM PLEBIS was the purely plebeian assembly; it was based upon a local tribal organisation, and voted by tribes (*tributim*). The *Concilium Plebis* was the assembly of the Plebs, a portion merely of the whole people, whereas the *Comitia Tributa* was an assembly of the whole people (*populus*): the term *concilium*, as distinguished from *comitia*, connotes this limitation. The *Concilium Plebis*, although sometimes referred to as or even confused with the *Comitia Tributa*, was distinct from that body in respect that it comprised only a portion of the whole Roman people, patricians being excluded; and it was convoked and presided over by a magistrate of the Plebeians themselves, such as the Tribune of the Plebs, and not by one of the whole people, such as the Consul or the Praetor.

The resolutions of the *Concilium Plebis*, under the name of *plebiscita*, were originally only binding upon the plebeians themselves, since the patricians, not being parties to their enactment, were held not bound thereby; but during the early Republican period the legislative authority of the *Concilium Plebis* gradually extended. The "Valerio-Horatian" law (*lex Valeria Horatia*) in 449 B.C. sought, according to Livy, to render *plebiscita* binding as *leges* upon the whole people, subject, it is conjectured, to the ratification of both the *Comitia Centuriata*[1] and of the Senate. The "Publilian" law (*lex Publilia Philonis*) of 339 B.C. is supposed to have repeated the provisions of the *lex Valeria Horatia* of 449 B.C. regarding the legal character of *plebiscita*, and to have at the same time dispensed with the necessary approval (*auctoritas*) of the *Comitia Centuriata*. The distinction between *leges* and *plebiscita* finally ceased after the passing of the "Hortensian" law (*lex Hortensia*) in 287 B.C., which gave to *plebiscita* the character and effect of *leges* without the necessity of the ratification of the Senate; thereafter the legislative authority of the *Comitia Tributa* and the *Concilium Plebis* was practically identical.[2] The legislative power of the popular assemblies (*Comitia*) passed to the Senate during the Early Empire, and *senatus-consulta* thereafter superseded *leges* as statutory law.[3]

SENATUS-CONSULTA[4] did not acquire the character of *leges* until the period of the Early Empire. During that period, however, resolutions of the Senate, in the form of *senatus-consulta*, came first of all, about the end of the first century A.D., to supersede *leges* in their authority, and afterwards came themselves to acquire the character of *leges* or statutory law, binding upon the whole people without the necessity of submitting

[1] Some writers think that the approval of the *Comitia Curiata* was alternative to that of the *Centuriata*.

[2] See, upon the various Roman *Comitia* or legislative assemblies, and their composition and character and functions, Poste, *Institutes of Gaius*, 4th ed., Introduction, XXV. s. 10; Hunter, *Roman Law*, 4th ed., 7-10; Muirhead, *Roman Law*, 48, 82 *et seq.*; Mackenzie, *Roman Law*, 7th ed., 398 *et seq.*; Walton, *Historical Introduction to Roman Law*, 40, 41, 71-76, and ch. xii. (2nd ed., 115-121); Ortolan, *History of Roman Law*, 28, 51, 52, 75, 186; also Botsford, *The Roman Assemblies* (1909).

[3] See *infra*.

[4] See *ante*, p. 18.

them to the *Comitia* or popular assemblies. The meetings of the Senate came indeed themselves to be sometimes styled *Comitia*.[1] These changes were considered by Justinian to have been the consequence of the increase in the numbers of the Roman people, and the consequent practical difficulty of assembling the whole people together for the purpose of legislation.[2] It had become necessary that the legislative authority should be centred in a smaller, more wieldy, and more experienced body.[3] About the beginning of the third century A.D., however, *senatus-consulta* as binding laws (*leges*) and as a source of law were themselves superseded by the "constitutions" (*constitutiones*) of the Emperors.

PRINCIPUM PLACITA.—This term, as a source of the Roman Law,[4] signified decrees or ordinances of the Roman Emperors giving expression to the Imperial will.[5] The general term used to denote law made either directly or indirectly by the Emperors was "constitutions"[6] (*constitutiones*). The Emperor's power of making law (*jus constituere*) was invested in him by the special statute passed at the beginning of each reign, known originally as the *lex regia*, and from the third century as the *lex de imperio*.[7] These statutes had the theoretical effect of investing the Emperor with all the law-making powers inherent in the people, giving to his enactments the force of law, and of putting the Emperor himself above the law.[8]

The law-making powers thus conferred upon the Emperor possessed a threefold character, being legislative, judicial, and interpretative. The will of the Emperor, in any of these characters, might be expressed in the form of (1) "edicts" (*edicta*), or general legislative enactments issued in his capacity as supreme legislator, and binding generally upon all his subjects; (2) "decrees" (*decreta*), or judgments given in his supreme judicial capacity; or (3) "rescripts" (*rescripta*) or "epistles" (*epistolae*), which were respectively answers given by the Emperor to judges, or answers in the form of letters (*epistolae*) addressed

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[1] *Cf.* Muirhead, *Roman Law*, 288; Moyle, *Institutes of Roman Law*, 47; Hunter, *Roman Law*, 75.

[2] Justinian, *Inst.* i. 2, 5; *Dig.* i. 2, 2, 9; Roby, *Digest of Justinian*, i. 8.

[3] "From the time of Tiberius onwards it was the Senate that did the work of legislation, for the simple reason that the *Comitia* were no longer fit for it" (Muirhead, *Roman Law*, 288).

[4] See *ante*, p. 17.

[5] *Cf.* Justinian, *Inst.* i. 2, 6; Gaius, *Inst.* i. 5.

[6] *Dig.* i. 4. 1, 1; Roby, *Dig.* i. 23.

[7] The *lex regia* and the *lex de imperio* was itself a survival of the still more ancient *lex curiata*, by which the Senate and the ancient *Comitia Curiata* together invested the Kings with the *imperium* and the *auspicia*, or the supreme secular and religious authority in the State (*cf.* Ortolan, *Hist. of Roman Law*, 229 *et seq.*).

[8] *Dig.* i. 4. 1, pr.

by the Emperor to either private persons or to public bodies upon particular and doubtful points of law submitted for Imperial determination, and issued by the Emperor in his interpretative capacity.[1] The will of the Emperor might also be expressed in the form of "mandates" (*mandata*), which were orders or instructions of a more or less permanent character issued to Imperial officers and officials in the provinces.[2] By the reign of the Emperor Hadrian the Imperial "constitutions" had become the sole source of law and legislation, and the whole legislative authority in the State was thereafter centred in the Emperor.[3]

Edicta Magistratuum

These, as a source of the Roman Law,[4] signified either general orders or public declarations of policy or principle promulgated from time to time by those high magistrates, such as the Consuls, the Praetors, and the Aediles, who possessed the *jus edicendi*, or the legal right to issue authoritative edicts.[5] All the principal magistrates in Rome possessed, in virtue of their office, the *jus edicendi*, or the right of issuing authoritative edicts or declarations of principle or policy upon matters coming within the scope of their particular functions.[6] This was a means employed from earliest Roman times for the promulgation of rules intended to be binding upon all citizens.[7] The Kings of Rome, in early times, issued "edicts" in virtue of their *imperium* or supreme secular authority. When the kingship was abolished the practice of issuing edicts was continued by all those higher magistrates amongst whom was divided the *imperium* formerly enjoyed and the functions formerly exercised by the kings; such magistrates included the Consuls, the Praetors, the Aediles, the Quaestors, and the Censors: the *jus edicendi* was also possessed by the governors of provinces, and by the Pontiffs. Thus, for example, by means of edicts, the Consuls convoked the Senate and the *Comitia;* the Aediles made known publicly the rules regulating

[1] Gaius, *Inst.* i. 5; Justinian, *Inst.* i. 2, 6; Justinian, *Dig.* i. 4. 1, 1; Monro, *Digest of Justinian*, i. 23.

[2] *Cf.* Hunter, *Roman Law*, 76; Sohm, *Inst.* 77 (3rd ed., 105, 106).

[3] See, upon Imperial "constitutions" generally as a source of law, Muirhead, *Roman Law*, 294, 295; Hunter, *Roman Law*, 76; Sandars, *Institutes of Justinian*, Introduction, s. 16; Moyle, *Institutes of Justinian*, 48; Sohm, *Institutes of Justinian*, 76 *et seq.* (3rd ed., s. 19); Ortolan, *History of Roman Law*, 227 *et seq.*; Girard, *Droit Romain*, 5th ed., 58-62.

[4] See *ante*, p. 17.

[5] In its strictest sense an edict signified an order promulgated by a *magistratus populi Romani* (Sohm, *Inst.* 48; 3rd ed., 74). *Cf.* the Imperial Edict with that of the Praetor (Sohm, 3rd ed., 106).

[6] Justinian, *Inst.* i. 2; Gaius, *Inst.* i. 6; *cf.* also Moyle, *Inst.* 30; Hunter, *Roman Law*, 34.

[7] *Cf.* Muirhead, *Roman Law*, 238 *et seq.*

the public market-places, and commercial transactions taking place in these places; and the Praetor declared the principles by which he intended to be guided in the exercise of his supreme judicial authority during his term of office.

Section V.—The Praetorian Edict

From a legal point of view the edicts of the Praetor and of the Curule Aedile[1] are of most importance; but most important of all was that of the Praetor. The Praetor being vested, in virtue of his office, with the supreme civil jurisdiction in the State, had naturally most occasion to issue edicts. A "praetorian" edict was, in the strict sense, an order promulgated by the Praetor, and intended to bind the whole people. In the general sense, however, the Praetor's "edict" was a general declaration by the Praetor of the principles by which he intended to be guided, during his period of office, in the course of his administration of the supreme judicial functions in those cases where the established rules of the *jus civile* either did not provide a remedy, or the remedy provided did not, in his free judicial discretion, suffice to do fair and even justice. The practice of the issue of a general edict by the Praetor did not synchronise with the creation of the office, but in course of time it became usual, until it finally developed into a fixed rule, for each praetor to issue, at the commencement of his term of office, a general declaration of the principles which, apart from the established rules of the *jus civile*, he intended to follow in his administration of justice.

The "praetorian" edict, like edicts generally, might be either general or special in its character. An edict issued with reference to some particular matter was known as *edictum repentinum* in order to distinguish it from the edict dealing with the Praetor's general administration, which was known as *edictum perpetuum*. The *edictum perpetuum* or "permanent edict" was thus that general one which had come to be issued as the established practice by each succeeding praetor at the commencement of his year of office, and which was intended to be binding throughout the whole of that period.[2] The *edictum repentinum* or "sudden edict" was, on the other hand, one issued from time to time during a praetor's term of office, and usually dealing with particular matters unexpectedly arising within the scope of the functions of

[1] With regard to the office of Curule Aedile, see *post*, Section VII.

[2] The *edictum perpetuum* or "general" edict, as distinguished from the *edictum repentinum* or "special" edict, must not be confounded with the consolidated Edict of Salvius Julianus known as "The perpetual edict" (*edictum perpetuum*) in a special sense, and otherwise distinguished as "Julian's edict," or "Hadrian's edict" (*q.v. post*, p. 27).

the Praetor's office, and requiring immediate determination. It was by means of the edicts of the "City" Praetor (*praetor urbanus*) and the "Foreign" Praetor[1] (*praetor peregrinus*) that the equitable principles of the *jus gentium*[2] were introduced into the Roman legal system, and by their operation vastly aided the development of that system by gradually displacing the rigidity and harshness of the strict *jus civile*.

The Praetor's "edict" (*edictum perpetuum*, or, otherwise, simply "the Edict") was not originally binding even upon himself, and he might, as he pleased, alter it from time to time by means of minor or subsidiary edicts (*edicta repentina*), or he might even entirely and arbitrarily disregard its provisions; for the Praetor's edict was originally a mere declaration, without the binding character of a statute (*lex*). The *lex Cornelia*, however, which was passed in 67 B.C., compelled the Praetor to abide by the terms of his general edict (*edictum perpetuum*), and rendered it illegal for him to depart therefrom; but the edict of one praetor was not binding upon his successor, for its validity expired with the year of office of the praetor who had issued it, and the succeeding praetor might alter it, or reverse it, or repeat it as he pleased;[3] it came, nevertheless, to be the established practice for each succeeding praetor to adopt and to repeat in his own general edict, in whole or in part, the edict of his predecessor, and merely to make upon it such additions or such alterations as, in his judgment, experience and practice had shown to be desirable.

In the course of time it became increasingly unusual for the new Praetor to alter the edict handed down to him by his predecessor; for the principles and rules contained and developed in the "general" edict had established themselves, and in the course of years and practical application had come to be generally understood and approved by the Roman public, and the alteration of the *edictum perpetuum*, except for specially clear and cogent reasons, came to be regarded with increasing disfavour.

That portion of his general edict (*edictum perpetuum*) which represented what a praetor had received, or had had handed down to him by his predecessor, and which he had adopted and incorporated in his own edict, was called the *edictum tralaticium* or "traditionary edict," and that portion of his edict which represented new material, in the

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[1] See *post*, p. 30.

[2] See *post*, Chapter II.

[3] "As the edict was never valid for more than one year, it was a convenient instrument for giving new principles a trial. If the innovations did not answer they could be dropped again at once" (Sohm, *Inst.* 53, s. 14; 3rd ed., 79).

way of additions, alterations, or abrogations, was known as the *edictum novum*, or the "new edict."

In this way that portion of the Edict handed down by one praetor to another and adopted in the succeeding edict gradually developed into a definite body of law of a permanent character, which might indeed be added to, but which could not be altered.

> The Praetorian Edict attained the height of its development in the last century of the Republic; by that time the greater part of the Edict was *tralaticium*,[1] and it had grown to the proportions of a regular system of equitable law, by which the formalism and rigidity of the older law was infinitely modified, and the law itself was extended and adapted to the requirements of a progressive community. The Praetorian Edict was not in itself, strictly speaking, law, for the Praetor had, theoretically, no actual legislative power; but he came in time to possess and exercise a certain limited power of law-making. The praetorian law was introduced into the Roman system by the Praetors for the purpose (according to the jurist Papinian[2]) of giving fuller effect to, or of supplementing, or of amending, the *jus civile*, with a view to the public advantage.[3]
>
> The Praetorian Edict was enabled to fulfil these functions, and to attain an authority equivalent to that of actual law (*lex*) based upon statute and custom by reason of the fact that although, technically, the Praetor could not directly create a new rule of law nor abrogate an existing one—that being competent only in the form of a statute (*lex*), a *plebiscitum*, or a *senatus-consultum*—he yet possessed, in virtue of the supreme judicial discretion inherent in his office in virtue of his *imperium*, the right, within the scope of his functions, either to add to or to alter the law, by deviating from its precise terms, in those cases where the existing law either did not provide for circumstances that had arisen, or the provision made was insufficient. In the process of adapting or extending the provisions of the existing law to render them applicable to new circumstances arising out of the requirements of a progressive community, the Praetor may be said to have exercised, by means of the Edict, a qualified power of legislation. This he was enabled to do by reason of the fact that all legal proceedings commenced in his court, and no judge could hear an action without his previous sanction.[4]

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[1] See Sohm, *Inst.* 51, s. 14, note 5 (3rd ed., 77).

[2] *Dig.* i. 1. 7, 1.

[3] "Adjuvandi, vel supplendi, vel corrigendi juris civilis gratia" (*Dig.* i. 1. 7, 1; Monro, *Digest of Justinian*, i. 5)—*e.g.* *adjuvandi*, the admission of *actiones utiles*; *supplendi*, recognition and protection of possession as distinguished from ownership; *corrigendi*, granting *bonorum possessio* to a person not strictly the heir.

[4] This arose in consequence of the sharp distinction drawn by the Roman Law between proceedings *in jure* and those subsequently *in judicio*. Proceedings *in jure* were those preliminary stages of an action taking place before the Praetor in which he determined the issue between the parties, and thereupon prepared instructions, known as a *formula*, for the guidance of the *judex* or private judge to whom he remitted the case for trial. The subsequent proceedings before the *judex* or judge were said to be *in judicio*. The separation of proceedings *in jure* and *in judicio* ceased after the introduction of the system of "extraordinary procedure," which superseded the "formulary" system.

It lay with the Praetor to determine, in the first instance, the question at issue between the parties, and, in his discretion, to allow or to refuse a legal remedy. Thus he might, upon equitable grounds, refuse to permit an action to be brought which, in the circumstances, was competent according to the strict *jus civile;* or he might allow an action to be brought in circumstances where the strict *jus civile* did not provide one; or he might admit, on grounds of equity, a defence or "exception" (*exceptio*) not previously recognised by the *jus civile;* or he might grant the possession of property to a person who by the strict *jus civile* had no proprietary right, and, in the exercise of his *imperium*, protect him in such possession by means of a possessory interdict. The whole law contained in the edicts of those high magistrates who possessed the legal right to issue such—*i.e.* the *jus edicendi*—and especially that contained in the edicts of the Praetor and of the Curule Aedile (the *jus praetorium* and the *jus aedilicium*)—was known generally as the *jus honorarium*, and was largely made up of rules derived from the principles of the *jus gentium*.

The *jus honorarium* was so called, according to Justinian, "because those who bear honours in the State, that is, the magistrates, have given it their sanction."[1]

The terms *jus honorarium* and *jus praetorium* are practically synonymous, for by far the greater portion of the *jus honorarium* is made up of the Praetorian Edict, and these terms signify that portion of the Roman Law which was developed by particular officials in the exercise of special authority vested in them by reason of the dignity and honour of their office, and which was, for the most part, applicable to both Roman citizens and non-citizens alike. In those few matters, moreover, in which the *jus honorarium* applied exclusively to Roman citizens it was characterised by freedom from the formalism of the strict *jus civile*.

The *jus honorarium* or "praetorian" law, in the form which it assumed in the Edict, was not, strictly speaking, "law," for that term signified those portions of the Roman law that were based upon express statute, or upon custom sanctioned by legislative enactment. In this way the *jus honorarium* was contrasted by the Roman jurists with the *jus civile* in the strict sense of the term. The *jus honorarium* was "law" only in respect that it was contained in the Edict and possessed the compelling sanction of the *imperium* of the Praetor, but it came in time to be regarded as itself part of the positive law of Rome.[2]

Consolidation of the Praetorian Edict

The advent of the Empire found the Edict almost entirely *tralaticium*, and it had, moreover, come to assume a character so more or less stereotyped as to render it unexpansive, and its regular re-issue practically a mere formality. Further, the exercise by the Praetor of an

[1] Justinian, *Inst.* i. 2, 7.

[2] The *jus civile* was, strictly, the indigenous Roman Law as contrasted with the *jus praetorium*, in so far as the latter represented the *jus gentium*. The *jus praetorium* had its origin in the *imperium* and the *jus edicendi* of the higher Roman magistrates.

independent power to make alterations upon the law of the Edict would have been inconsistent with the authority of the Emperor. It thus became advisable to determine the relation of the Praetorian Edict to the legislative authority of the Emperor, and to finally determine the contents of the Edict.[1] Accordingly, about 131 A.D. the jurist Salvius Julianus was commissioned by the Emperor Hadrian to revise and codify the edicts of the "urban" and of the "peregrin" Praetor, incorporating at the same time certain portions of the Aedilician Edict,[2] and also the edicts of provincial governors (*edicta provincialia*). When this codification was completed in 131 A.D. it was, with Imperial authority, ratified by a *senatus-consultum;* and this consolidated edict was thereafter known as "the Perpetual Edict" (*edictum perpetuum*) in a special sense, as signifying one intended to be final in form, and of permanent binding effect.[3] From that time changes in the law were not operated through the Edict in the form of praetorian law, but by Imperial legislation in the form of constitutions. With the consolidation of the Edict praetorian law (*edicta magistratuum*) ceased to be effective as a source and as a means of the further development of the Roman Law. The Perpetual Edict thereafter constituted a great system of equitable law grafted upon the *jus civile* as originally declared in the Twelve Tables, interpreting it, extending it, and adapting it to the altered and more complex conditions necessarily incidental to the development of a progressive community. The Twelve Tables, however, always continued, down to the latest Roman times, to be regarded as the statutory foundation of the Roman law.[4]

The consolidated edict is known not only as the "Perpetual Edict" but also as "Hadrian's edict" (*edictum Hadrianum*) and as "Julian's edict" (*edictum Julianum*).[5]

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[1] *Cf.* Moyle, *Inst.* 49; Sohm, *Inst.* 54 (3rd ed., 85).

[2] Specially those parts relating to the regulation of market transactions, and the preservation of public order and safety in open spaces and streets.

[3] The "perpetual edict" of Hadrian must not be confused with the *edictum perpetuum* or general edict issued by each successive praetor at the commencement of his year of office (see *ante*, p. 24, note 2; see also Mackenzie, *Roman Law*, 16, note 1; Muirhead, *Roman Law*, 290).

[4] *Cf.* Sohm, *Inst.* 29.

[5] See, upon the Praetorian Edict generally, and also upon the consolidated Edict, Muirhead, *Roman Law*, 238 *et seq.*, 289-291; Moyle, *Inst.* 29 *et seq.*; Sohm, *Inst.* 48 *et seq.* (3rd ed., 73-80); Ortolan, *History of Roman Law*, 194-198, and 253-255. Various attempts have been made to reconstruct the Perpetual Edict from the quotations from the Julian edict embodied in the fragments of the writings of the commentators preserved by Justinian. In the views of Muirhead and of Moyle the most successful as well as most scientific efforts are those of Lenal in 1883, and of Rudorff in 1869 (Muirhead, *Roman Law*, 291; Moyle, *Inst.* 50. See also Mackenzie, *Roman Law*, 16, note 2).

Section VI.—The Praetorship

The office of "Praetor" or supreme judge in the Roman State was created during the period of the Republic, when, by the operation of the "Licinian" law (*lex Licinia*), in 367 B.C., the Consulship was thrown open to plebeians as well as to patricians. The functions of the Praetor were to exercise the supreme judicial functions previously performed by the Consuls, and by the Kings of Rome before them, in virtue of the *imperium* or supreme secular authority conferred upon them at the time of their election. The Praetor was practically a third consul, whose powers, however, were generally limited to the supreme administration of justice. He had the same *imperium* as the Consuls, except in military matters, and in the absence of both Consuls the Praetor administered the affairs of the State.[1]

The primary reason for the creation of the Praetorship, and at the same time the office of Curule Aedile, is generally considered to have been in order to retain in the hands of the patricians exclusively certain consular functions, when the *lex Licinia* of 367 B.C. compulsorily admitted plebeians to the Consulship by enacting that one of the two Consuls must be a plebeian.[2] The *lex Licinia* was re-enacted in 342 B.C., and provided then, still further, that not only must one of the Consuls be a plebeian, but also that both Consuls might belong to that order. This re-enactment was brought about by the practical disregard of the terms of the statute of 367 B.C., and the continued election thereafter of patricians to both of the consular offices.

The Praetorship did not long continue exclusively patrician, for in 336 B.C. plebeians became eligible for the office.[3]

The office of Praetor was an annual one, and the election to it was made by the *Comitia Centuriata*.

For about 120 years after the institution of the Praetorship there was only one Praetor who sat at Rome and administered justice amongst all persons there, whether Roman citizen or foreigner (*peregrinus*). Between 247 B.C. and 241 B.C.,[4] however, a second praetor was appointed,

[1] Muirhead, *Roman Law*, 228 ; Sohm, *Inst.* 48, note 1 (3rd ed., 74); Hunter, *Roman Law*, 34.

[2] See Muirhead, *ut supra*, 228, and Hunter, *Roman Law*, 35, and *cf.* Moyle, *Inst.* 22. Moyle is of opinion that the office of Praetor was really in existence for some time previous to the *lex Licinia*.

[3] Within thirty years after the admission of plebeians to the Consulship they had been admitted to most of the supreme offices in the State—the Dictatorship in 356 B.C., the Censorship in 351 B.C., the Praetorship in 336 B.C. Previous to the passing of the Licinian laws the plebeians had already been admitted to the office of Military Tribune in 445 B.C., and to the Quaestorship in 421 B.C. The office of Pontifex Maximus was finally opened to them in 254 B.C.

[4] The exact date is uncertain. Muirhead, *Roman Law*, 228. Hunter (*Roman Law*, 34) and Moyle (*Inst.* 32), fix 247 B.C., but Muirhead does not commit himself to a precise date.

who became known as the *praetor peregrinus* in contradistinction to the *praetor urbanus.*

The creation of this new office was rendered necessary by the great increase in Rome's population, both citizen and non-citizen, and the great development of commercial relations between citizens and foreigners, which necessitated the legal recognition of the latter.

The second praetor was specially appointed to administer justice at Rome as between foreigners or "peregrins" (*peregrini*) *inter se,* and between foreigners and Roman citizens. This second praetor was therefore styled, by reason of his special functions, the *Praetor Perigrinus* or "Foreign" Praetor, whilst the original Praetor was distinguished as the *Praetor Urbanus* or "City ' Praetor, whose functions were thereafter confined to the administration of justice at Rome, and the application of the strict *jus civile* in matters arising between Roman citizens only.

Both Praetors were elected annually by the *Comitia Centuriata,* just as had been the procedure when there was only a single Praetor.

The numbers of Praetors were increased as the Roman territories extended beyond Italy, and provincial praetors were appointed to administer different regions; thus in 227 B.C. two praetors were appointed to administer the government of Sicily and Sardinia, and two more were appointed in 197 B.C. for the administration of the newly created Spanish provinces. Under the rule of Sulla, the Dictator, the number of praetors was increased to ten, and Julius Caesar raised their number to twelve.[1] The "Urban" and the "Peregrin" Praetor both sat at Rome, ranking next to the Consuls, and of the two the "City" Praetor had precedence.[2]

The *Praetor Peregrinus,* in the course of administering justice at Rome between foreigners *inter se,* and between foreigners and Roman citizens, was unable to apply the rules of the strict *jus civile,* because these rules were only applicable and competent to Roman citizens, or to those to whom the privilege of Roman citizenship had been extended; and a foreigner or "peregrin" in the course of his commercial relations, whether with citizens or with other foreigners, was not entitled to use the forms of the *jus civile.*[3] The *Praetor Peregrinus* was thus, in the ordinary exercise of his functions, faced with the necessity of either devising or of discovering general principles and rules of law that

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[1] According to Muirhead the increased numbers of the praetors were eight and sixteen respectively (*Roman Law,* 229).

[2] Hunter, *Roman Law,* 34; Ortolan, *History of Roman Law,* 158. About 144 B.C., shortly after the establishment of the *quaestiones perpetuae,* all the Praetors were detained in Rome, two of them as presidents of the civil courts, the rest as presidents in the criminal courts (Hunter, *ut supra*).

[3] *E.g. legis actio, mancipatio, sponsio, testamentum, expensilatio.*

would be capable of applying equally to, and would be equally understood by, peoples of different countries doing business with each other, and which would do fair justice between them.

The "Peregrin" Praetor, like the "City" Praetor, was in the habit of issuing an *edictum perpetuum*, which, as promulgated by him, constituted "a collection of legal rules which were found to be observed in common by all the peoples with whom Rome was acquainted."[1] These rules came to be known as the *jus gentium*,[2] and the application of them in practice had a profound influence upon the development of the Roman jurisprudence.

The Provincial Praetors also issued edicts known collectively as the *edictum provinciale*, and framed upon the lines of the Edict of the City Praetor,[3] which are generally considered to have considerably influenced the development of the principles of the *jus gentium* in the edict of the "Peregrin" Praetor.

The edict of the "Peregrin" Praetor, with its developed principles of the *jus gentium*, was gradually adopted by, and incorporated in that of, the "Urban" Praetor, and in that way its contents came to be binding as law upon Roman citizens *inter se*. By the end of the Republican period the edicts of the "Urban" and of the "Peregrin" Praetor were practically identical.[4]

> Both the *Praetor Urbanus* and the *Praetor Peregrinus* were enabled to indirectly legislate, and directly to influence, the development of the Roman legal system by means of the provisions of the statute known as the *lex Aebutia*, from the date of the passing of which their activity may be considered to have commenced to become effective. Neither the precise date[5] nor the specific provisions of the *lex Aebutia* are known, but its purpose seems to have been to authorise the Praetors to simplify the existing forms of process, or to substitute new ones in actions on the *jus civile*, and to empower them to adapt existing remedies to altered circumstances, and to fashion new actions on the *jus civile* for the use of peregrins to whom the procedure of the *legis actiones*—few in number, formal in character, and based upon the narrow and exclusive early *jus civile*—was incompetent, and to protect claims well founded in equity but incompetent according to the strict law.[6]
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> The practical effect of the *lex Aebutia*, whatever were its specific

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[1] Moyle, *Inst.* 34.

[2] See *post*, Chapter II. Section IV.

[3] See upon this special point, Moyle's reference at p. 33 (*Inst.*) to Smith's *Dictionary of Greek and Roman Antiquities*, and Sohm, *Inst.* 56, note 12.

[4] *Cf.* Sohm, *Inst.* 56, note 12.

[5] It is generally supposed to have been enacted about the time of the institution of the Peregrin Praetorship. See, on that point, Muirhead, *Roman Law*, 230, note 3.

[6] *Cf.* Muirhead, *Roman Law*, 230, 231.

provisions, was to supersede the old "actions of the law" [1] (*legis actiones*) by what is known as the "formulary" system of procedure, by means of which the Praetor, in the exercise of his judicial discretion, and in virtue of his *imperium*, formulated in writing the issue between the parties to an action before sending it to a judge (*judex*) for trial, and directed the judge to condemn or acquit according as he should determine the facts.[1]

Judged by its effects, the *lex Aebutia* must be regarded as one of the most important pieces of comitial legislation in the latter half of the Roman Republic.[2]

It was through the medium of the edict of the Peregrin Praetor, in the first instance, that the equitable principles of what was known as the *jus gentium* were introduced into the Roman legal system, profoundly modifying its character and extending its application.

Section VII.—The Curule Aediles

The office of "Curule Aedile" is supposed to have been created about the same time as the establishment of the Praetorship.[3] The office was originally open to patricians, but ere long plebeians became equally eligible.

At the time of the creation of the office of Curule Aedile there had already existed in Rome, since 494 B.C., plebeian magistrates, known as "Aediles" (*aediles*), exercising police jurisdiction under the authority of the Tribunes of the plebeians. They were originally entrusted with the special duty of preserving the tablets on which were inscribed the laws passed by the popular assemblies—the *Comitia Centuriata* and *Comitia Tributa*—and after 446 B.C. the decrees of the Senate. Afterwards their functions were extended, and they came to be regarded as independent magistrates.

The two new patrician Aediles exercised functions analogous but superior to those performed by the plebeian Aediles, and they were styled "curule" Aediles (*aediles curiles*) or "superior" Aediles (*aediles majores*), whilst the original Aediles were, in contradistinction, styled "plebeian" Aediles (*aediles plebeii*).[4]

The functions attached to the office of Curule Aedile were originally connected with the celebration of the great public games known as the *ludi Romani*, in commemoration of the union of the two orders in the State; but they came to be extended to the preservation of temples

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[1] See upon the *lex Aebutia* and its effects, Sohm, *Inst.* 168-174 (*cf.* 3rd ed., 247 *et seq*).

[2] Muirhead, *ut supra*, 230.

[3] 367 B.C.

[4] See Ortolan, *History of Roman Law*, 123; Hunter, *Roman Law*, 43.

and amphitheatres, and to the regulation of matters connected with public order and with public health, and with the maintenance and safety of public streets, spaces, bridges, and buildings, and the supervision of the public markets and the regulation of the public supplies of grain. In short, the functions of the Curule Aediles came to be extended to "all matters, whether connected with the public health, religion, morality, streets, buildings, or security of person and property, so far as they could be placed under the control of police."[1] The Aediles had a separate jurisdiction of their own and a tribunal for the administration of matters peculiar to their office. In the exercise of their functions they were entitled to inflict fines by way of punishment for such offences as the hoarding of grain in time of scarcity, nuisances, improper weights, and unwholesome foods.[2]

> The direction of the public games was, however, as Ortolan puts it,[3] the privilege which conferred the greatest distinction upon the office of Curule Aedile, and which came to be an essential part of it. "Rome already possessed its circus, where pugilistic encounters, combats, horse and chariot races, borrowed from the Olympic games of Greece, were celebrated. In their amphitheatres were to be seen the contests of gladiators and wild beasts, a bloody spectacle, but suited to the national taste. Theatres for dramatic representations were erected at a later period. These games served as the means of celebrating public and private *fêtes*, especially the funerals of the great. Every citizen was at liberty to offer a spectacle to the people, but in every case it must be under the supervision of the Aediles, who themselves were compelled, at least once during the year, to present, at their own private expense, a public exhibition, and they took care never to fail in this, for nothing was lost by it, the presentation of an acceptable spectacle to the crowd being at all times a sure means of securing its suffrage."[4]

The Curule Aediles, in common with the other higher Roman magistrates, possessed the right of issuing edicts (*jus edicendi*). The judicial functions of the Aediles were exercised chiefly in connection with the regulation of the public markets; and the most important provisions of the Edict of the Curule Aedile—known as the *Jus Aedilicium*—dealt with sales in open market of slaves, horses, and cattle, and the legal duties of sellers exposing such forms of property for sale, and their liability for undisclosed defects.[5]

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[1] Moyle, *Inst.* p. 22.

[2] Hunter, *Roman Law*, 42-44. *Cf.* Moyle, *Inst.* 22 and 408. See also on the functions of the Curule Aediles, Greenidge, *Roman Public Life*, 209 *et seq.*

[3] Ortolan, *History of Roman Law*, 124.

[4] Ortolan, *ibid.*

[5] *Cf.* Muirhead, *Roman Law*, 242.

The commercial law of Rome, and especially the law relating to the contract of sale, was largely developed through the Edict of the Curule Aedile, and certain important rules of law owed their origin to the Aedilician Edict. The Aediles in their Edict held that a warranty against undisclosed defects was implied in all contracts for the sale of slaves, horses, and cattle in the open market subject to their jurisdiction, and they introduced through their Edict two new forms of action, known respectively as the *actio redhibitoria* and the *actio quanti minoris* or *aestimatoria*, for the enforcement of this warranty. These two new remedies are known generally as the "Aedilician Actions." [1]

The *actio redhibitoria* had as its object the rescission of the contract because of the defect in the subject, and the recovery of the purchase price, with interest; this action was only competent, however, if brought within six months from the date of the contract. The *actio aestimatoria*, or, as it was otherwise called, the *actio quanti minoris*, did not have as its object the rescission of the contract, but only sought to recover compensation for the undisclosed defect, the compensation being represented by a portion of the purchase price proportionate to the defects disclosed. This action could competently be brought at any time within a year of the contract.[2]

The implied warranty enforceable by the aedilician actions was extended during the classical period, after Labeo,[3] to every kind of sale, and was no longer confined to sales of slaves, horses, and cattle. Besides the aedilician actions there were other rules of law introduced into the Roman system by the Aedilician Edict, such as an implied warranty against eviction in contracts of sale and hire, and a liability to a penal action for damage done through bringing dangerous animals on to a public road.[4]

Section VIII.—Interpretation, Equity, and Legislation as Means of Development of the Roman Law

The crude, limited, and formal rules of the early Roman Law, as contained in the Twelve Tables, for the most part, developed gradually

[1] *Dig.* xxi. 1, 21 pr.; xix. 1, 13. See Moyle, *Inst.* 434; Sohm, *Inst.*, 2nd ed., 310 (3rd ed., 400); Hunter, *Roman Law*, 505. See also "Contract of Sale" in *The Law of Obligations, post*, Part IV.

[2] See also, besides authorities cited *supra*, Mackenzie, *Roman Law*, 237; Girard, *Manuel de Droit Romain*, 551-554 (5th ed., 563-567).

[3] Moyle, *ut supra*, 435. Marcus Antistius Labeo was the supposed founder of the "Proculian" school of law, which for about two centuries was in its views the rival of that known as the "Sabinian" school. Labeo lived in the Early Empire during the reigns of Augustus and Tiberius, and was a jurist of great eminence and authority, whose writings were largely quoted in the *Digest*. His actual dates are supposed to have been from *circa* 54 B.C. to 17 A.D. (Clark, *History of Roman Private Law*, pt. i., Sources, p. 107). See upon the "Proculian" and "Sabinian" schools of law, Muirhead, *Roman Law*, 296-298; also Moyle, *Inst.* 52; Sohm, *Inst.* 64, 65 (3rd ed., 94-98); Roby, *Introduction to Justinian's Digest*, ch. iv.; Roby, *Roman Private Law*, i. 15.

[4] Justinian, *Inst.* iv. 9, 1. *Cf.* Moyle, *Inst.* 577, 578.

into the form they finally assumed in the *Corpus Juris Civilis* of Justinian by the three great general means of Interpretation, Equity, and Legislation.

INTERPRETATION, as a means of development of the Roman Law, assumed two forms: it was either "jurisprudential" or "magisterial."

The magisterial interpretation was effected through the medium of the Praetorian Edict.[1]

The jurisprudential interpretation passed through several clearly marked stages,[2] but it was originally entirely in the hands of the College of Pontiffs, a patrician body that possessed the exclusive right of giving an "interpretation" (*interpretatio*) of the existing law. Up to the time of the publication of the Twelve Tables the law consisted almost entirely of unwritten customs, largely partaking of a religious character. The knowledge of these customs was the exclusive possession of the College of Pontiffs, to the members of which it was transmitted orally and with the strictest secrecy, as was also the knowledge of the forms of action and procedure based upon these customs, and of the days upon which it was competent or incompetent to transact judicial business. The effect of the promulgation of the Twelve Tables was undoubtedly to give a certain definiteness and publicity to the law, which until that time had been uncertain in its terms, by reason of the jealous privacy in which its knowledge was preserved; but, nevertheless, the exclusive knowledge and right of interpretation of the law continued to be possessed by the College of Pontiffs for more than a hundred and fifty years after the publication of the Twelve Tables, as well as the custody of the Tables themselves, until circumstances led to the secularisation of the interpretation of the law [3] by the growth of a class of professional lay jurists, who publicly professed a special knowledge of the law and of its forms, and held themselves out as prepared to give information and advice upon legal matters to any of the public who might choose to consult them.[4]

Such persons were known as "jurisprudents" (*jurisprudentes*) or "jurisconsults" (*jurisconsulti*), but their opinions originally possessed no authoritative or binding legal effect, and were of value only in proportion to the eminence of the particular jurists who gave them. In the Early Empire, however, the Emperor Augustus instituted an

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[1] See *ante*, p. 24.

[2] See *post*, p. 36.

[3] For the nature of the special circumstances which brought about the secularisation of the interpretation of the law, see *post*, p. 39.

[4] *Cf.* Muirhead, *Roman Law*, 246.

important change which very greatly altered the position of the "jurisprudents," by conferring upon a limited number of specially eminent jurists what was known as *jus respondendi ex auctoritate principis*, or the right of giving "responses" (*responsa*) or opinions that should be regarded by both judges and private persons as binding, and as effectual as if emanating from the Emperor himself.[1] *Responsa prudentium*, as a source of the Roman law, thus signified the replies or opinions of those eminent jurists specially authorised during the Early Empire to publicly interpret the law and to give authoritative opinions upon legal points of doubt or difficulty.[2]

The grant of this special patent, however, and the creation of a class of "patented counsel," did not in any way affect the right of other jurists to give advice upon the law, but such unauthorised opinions possessed no binding character.

The official "responses" (*responsa*) of the patented counsel required, in order to be authoritative and as a safeguard against forgery, to be in the writing and under the seal of the jurist, and to have direct reference to the particular case actually under litigation.[3]

> The development of the Roman legal system by means of Interpretation at the hands of jurists passed through three clear stages which have been styled (1) the esoteric phase; (2) the phase of secularisation; and (3) the phase of systematisation.[4]
>
> During the first of these phases the knowledge of the law was the secret monopoly of a small caste represented by the College of Pontiffs, and the pontifical interpretation and jurisprudence partook, for the most part, of a religious and mysterious character; and it was, moreover, not infrequently applied in the interests of the class to which the interpreters belonged.[5]
>
> The second phase of interpretation—that of secularisation—is characterised by the diffusion of a knowledge of the law through the growth of a body of secular jurists who superseded the priestly caste in the function of the interpretation of the law.
>
> The third phase—that of systematisation—is marked by the attempt to express the whole body of law and legal rules in a systematic form

[1] *Dig.* i. 2. 2, 48-50. Upon the circumstances leading to the institution of the special grant of the *jus respondendi* see Muirhead, *Roman Law*, 292; Moyle, *Institutes of Justinian*, 57; Sohm, *Institutes of Roman Law*, 63 (3rd ed., 93); Poste, *Institutes of Gaius*, 4th ed., Introduction, s. 18. The account given by Pomponius, as quoted in the *Digest* (i. 2. 2, 48-50), has given rise to some doubt as to whether Augustus or Tiberius is entitled to the credit of the introduction of the *jus respondendi;* see Muirhead, *ut supra.*

[2] Justinian, *Inst.* i. 2, 8; Gaius, *Inst.* i. 7.

[3] Muirhead, *Roman Law*, 293. *Cf.* also Moyle, *Inst.* 58; Poste, *Institutes of Gaius*, 4th ed., Introduction, s. 18.

[4] Moyle, *Inst.* 42.

[5] *Cf.* Sohm, *Inst.* 59 (3rd ed., 88 *et seq.*); Poste, *Institutes of Gaius*, 4th ed., Introduction, s. 14.

and classification by means of treatises and commentaries written by distinguished jurists.

The phase of systematisation may be regarded as commencing with Q. Mucius Scaevola, Pontifex Maximus, who was Consul in 95 B.C., and the most distinguished of all the *Veteres* or earlier jurists who preceded the period of what is known as the "classical jurisprudence." About 100 B.C. Scaevola wrote a treatise upon the *Jus Civile* in eighteen books, which was the first attempt to set forth the law in a systematic order. There had already been published, about a hundred years previously, the *Tripertita* of Aelius Paetus, but this work was in no sense systematic.[1]

Scaevola was the first juristic writer who attempted to systematically define the various legal institutions and their various forms and relations.[2]

Corresponding to the three phases of the development of the Roman law by Interpretation,[3] the Jurists who interpreted the law may be ranked in three great divisions, namely (1) the Pontiffs and the earliest lay jurists; (2) the "Veteres"; and (3) the "Classical Jurists."

The PONTIFFS and the earliest lay jurists professed to interpret the strict *jus civile* as expressed in the Twelve Tables and in subsequent legislation.

The "VETERES" were those lay jurists who succeeded the period of the pontifical *interpretatio* of the Twelve Tables, but preceded the period known as that of the "classical jurisprudence." The "Veteres," like the Pontiffs, professed to merely interpret the Twelve Tables and subsequent legislation, but in so doing both they and the Pontifices undoubtedly read into the rules of the early strict *jus civile* much that was not originally there, in order to adapt the existing law, by their interpretation, to the conditions and requirements of an advancing state of society, and to circumstances and cases not originally contemplated by the law. At the same time they sought to avoid an apparent violation or departure from the strict letter of the law, and this was mainly effected by the employment of what are known as "legal fictions," which have been defined as being, in the widest sense, "any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."[4]

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[1] See *post*, p. 39.

[2] See Sohm, *Inst.* 61 (3rd ed., 91); Moyle, *Inst.* 45.

[3] See p. 36.

[4] Maine, *Ancient Law*, 26. The principal form assumed by the legal fiction in the Roman Law was the application and adaptation of old and familiar procedure, with a new significance in order to meet new requirements of the law. Examples of such an employment of fictions were the use of the forms of the old process of *mancipatio* to effect both the emancipation and the adoption of a *filiusfamilias*; also the fictitious *coemptio fiduciae causâ*, and the various juristic acts introduced into the

The necessity for such an "interpretation" of the law at the hands of the pontifices and jurisprudents, and for the employment of legal fictions in so doing, arose from the fact, due to the inherent conservatism of the Romans, that the Twelve Tables were always regarded as the statutory source and foundation of all Roman Law, and, as such, unalterable in its terms.[1] This belief in the fundamental and permanent authority of the Twelve Tables subsisted until the final development of the law in the form of the *Corpus Juris Civilis*, although by that time the original structure was completely altered in character and quite unrecognisable.

The influence of the "Veteres" upon the development of the Roman Law was mainly indirect, through the medium of the Praetorian Edict and magisterial interpretation.

The period of "interpretation" in the strict sense, as signifying the extension of the application of the strict *jus civile* as contained in the Twelve Tables, embraces the later centuries of the Roman Republic.

The so-called CLASSICAL JURISTS were certain eminent jurists who lived between the reign of the Emperor Hadrian and the middle of the third century of the Christian Era, from whose writings the *Digest* and the *Institutes* of Justinian are mainly compiled. The Classical Jurists represent the matured "scientific" Roman jurisprudence, and they are generally considered to have comprised the jurists Salvius Julianus, Pomponius, Gaius, Papinian, Ulpian, Paul, and Modestinus.[2]

Roman legal system through the medium of the fictitious process of *in jure cessio* for such purposes as manumission, emancipation, adoption, transfer of ownership, creation of servitudes, assignation of an inheritance, or assignation of the legal tutory of women (*tutela legitima mulierum*).

Another form frequently assumed by the legal fiction in the Roman Law was that of an assumption of something as true which in fact was known not to be true, as in the case of such fictitious actions (*actiones fictitiae*) as the "Publician" (*actio Publiciana*), the "Paulian" (*actio Pauliana*), the "Servian" (*actio Serviana*), and the "Rutilian" (*actio Rutiliana*), and those fictitious actions available against aliens that were introduced by the Praetor in his Edict on the fiction that the aliens were really Roman citizens, and the actions available against persons who had undergone *capitis deminutio* that were based on the fictitious assumption that no *capitis deminutio* had taken place (see Gaius, iv. 34-37; Muirhead, *Roman Law*, 339 and 252; Poste, *Institutes of Gaius*, 471-474; Muirhead, *Institutes of Gaius*, 285 *et seq.*). Still a third form assumed by the legal fiction in the Roman Law was that of the doctrine of the identity of the *persona* of the deceased in that of his heir, and the doctrine of universal succession.

See also upon the employment of fictions in the process of interpretation and extension of the law, Sohm, *Inst.* 27-38.

[1] *Cf.* Sohm, *Inst.* 28, 29 (3rd ed., 54). "In the Twelve Tables Roman Law had to a considerable extent received the form of a *lex*."

[2] Some writers include amongst the Classical Jurists P. Juventius Celsus, who lived in the reign of Domitian, was Praetor in 106 A.D., Consul for the second time in 129 A.D., and wrote a *Digesta* in thirty-nine books, and is frequently cited directly in Justinian's *Digest*. (See Clark, *Roman Private Law*, pt. i. 115; Sohm, *Inst.* 66; 3rd ed., 97.)

Modestinus died about 244 A.D., and with his death the development of the Roman Law by direct juristic interpretation ceased abruptly, and a general decline of Roman jurisprudence immediately set in. Thereafter the development of the law proceeded mainly by legislation in the form of Imperial "constitutions." The practice of granting the *jus respondendi* was discontinued about the reign of the Emperor Diocletian, and from that time the place of the *responsa* of patented counsel was taken by Imperial "rescripts." [1]

> The Classical Jurists interpreted the newer law of the consolidated Praetorian Edict, just as the Pontifices and the "Veteres" or earlier jurists had interpreted the old law of the *jus civile* as contained in the Twelve Tables, and by their scientific "new interpretation" [2] and application of the developed principles of the *jus gentium* [3] and of the *jus naturale*,[4] and in virtue of the quasi-legislative power involved in the possession of the *jus respondendi* they largely and directly influenced the development of the Roman legal system.[5] "The great bulk of the Roman Law and all that is most valuable in it is due to the activity of the jurisconsults, down to the end of the second century of the Christian era." [6]
>
> It is in the sphere of the law of obligations that the interpretation of the classical jurists bore its finest fruit; within that region alone they reared up a system so comprehensive and so equitable as to constitute in substance and in form a permanent memorial to their labours, and which has given to the Roman Law its universal character and its lasting influence.[7]

The secularisation of the interpretation of the law and the supersession of the pontifical *interpretatio* by the "responses" (*responsa*), or opinions of lay jurists (*prudentes*) began in 304 B.C. with the publication of what is known as the *Jus Flavianum*. This was a collection of the various forms of legal process—the proper *formulae* of the "actions of the law" (*legis actiones* [8]) in the shape which they had assumed in the course of the secret and sacred pontifical interpretation—and an enumeration of the *dies fasti* and *nefasti*, or a calendar of those Court days upon which legal business could or could not competently be transacted. This collection derived its name from Gneius Flavius, the son of a freed

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[1] Sohm, *Inst.* 71, s. 15; 79, s. 16; 83, s. 17.

[2] Sohm, *Inst.* 72, s. 15 (3rd ed., 101).

[3] See *post*, Chapter II., Section IV. (1).

[4] See *post*, Chapter II., Section IV. (2).

[5] *Cf.* Muirhead, *Roman Law*, 292; Sohm, *Inst.* 75, s. 15.

[6] Hunter, *Roman Law*, 55.

[7] On *Interpretation* generally, see Muirhead, *Roman Law*, 243-248; Sohm, *Inst.* 30-38, 59-66 (3rd ed., 55-64, 88-104); Poste, *Institutes of Gaius*, 4th ed., Introduction, xxxvii. s. 14

[8] On *legis actiones* see Muirhead, 172 *et seq.*; Gaius, *Inst.* iv. ss. 10-29; Poste, *Institutes of Gaius*, 454 *et seq.*

man who was secretary to Appius Claudius Caecus. He obtained—it is generally believed to have been by questionable means[1]—the record of the actions of the law and their special forms which his master Claudius Caecus had already prepared about 300 B.C., and made it public.[2]

About a century later (*circa* 200 B.C.) Sextus Aelius Paetus, who was then Curule Aedile, and who two years later (198 B.C.) became Consul, published a collection of the law in three parts, for which reason it was styled *Commentaria Tripertita,* which contained the Twelve Tables, their pontifical interpretation, and the formulae of the "actions of the law" (*legis actiones*). This collection is known as the *Jus Aelianum.*[3]

Between the publication of the *Jus Flavianum* and the *Jus Aelianum* Tiberius Coruncanius, the first plebeian Pontifex Maximus, who became Consul in 280 B.C., had about 254 B.C. professed himself willing to give information and advice upon the law to any of the public, and he was the first public professor of the *jus civile.*[4]

These circumstances—the publication of the *Jus Flavianum* and of the *Jus Aelianum* and the public profession of the law instituted by Tiberius Coruncanius—led to the termination of the exclusive monopoly of knowledge and interpretation of the Law previously enjoyed by the College of Pontiffs, and "we have the first beginnings of a system of public legal instruction, and, as its necessary consequence, a juristic literature."[5]

Thereafter the technical knowledge of the law gradually passed from

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[1] Pomponius, *Dig.* i. 2. 2, 7; Livy, ix. 46. But *cf.* Muirhead, 246, where this view is not held.

[2] *Dig.* i. 2. 2, 7; Livy, ix. 46.

[3] Muirhead, *Roman Law,* 247, note 12; Hunter, *Roman Law,* 54; Justinian, *Dig.* i. 2. 2, 38. Sohm seems to consider that the *Jus Aelianum* strictly so called was a mere collection of the formulae of the actions of the law in the shape given to them by pontifical interpretation, whilst the *Commentaria Tripertita* was a more ambitious work, in respect that it professed to offer a commentary or explanation of the Twelve Tables, and of the pontifical interpretation of them. According to Sohm the *Tripertita* represents the first attempt to set forth the pontifical *jus civile* in a literary form—"in the form, it is true, of mere explanatory or exegetic notes, but, nevertheless, a book—the first book dealing with law," and hence styled by Pomponius "the cradle of juristic literature" (Sohm, *Inst.* 60, s. 15; 3rd ed., 90).

[4] *Dig.* i. 2. 2, 38; Muirhead, *Roman Law,* 247.

[5] Sohm, *Inst.* 60, s. 15 (3rd ed. 90). The earliest collection of the Roman Law is considered to be the *Jus Civile Papirianum.* This was, according to Pomponius (*Dig.* i. 2. 2, 2), a collection of *leges regiae,* or enactments of the regal period of Rome's history, made by one Sextus Papirius in the reign of Tarquinius Superbus (see Moyle, *Inst.* 2; Hunter, *Roman Law,* 1). Sohm and some other authorities, however, think that the *Jus Papirianum* was probably a private collection of rules of a more or less religious character dating back to the regal period but compiled about the close of the period of the Republic (Sohm, *Inst.* 28, s. 11, and note 2; 3rd ed., 54).

the pontifices to the class of professional lay jurists known as "jurisprudents" (*jurisprudentes*) or "jurisconsults" (*jurisconsulti*), and the interpretation of the law then definitely passed from the esoteric stage to that of secularisation.

Functions of a Jurisconsult.—The functions of a jurisconsult were summarised by Cicero[1] as *respondere*, *cavere*, *agere*, and *scribere*.

The preponderance of opinion as to the signification of these terms is that *respondere* signified the giving of opinions upon particular matters of actual litigation involving doubt or difficulty; *cavere* signified the protection of the client's rights by advising as to preliminary procedure and the preparation of an appropriate *formula* for an action; *agere* signified the conduct of a case in court before the judge or magistrate.

Scribere is supposed to have signified, in a strict sense, the preparation of legal documents, and, in a general sense, to have been extended to comprise the composition of legal works and treatises.[2]

The functions of a Roman jurisconsult, however, were not entirely confined to the sphere of litigation, but extended to all matters of a business nature involving skilled legal knowledge and assistance, such as, for example, as instanced by Cicero,[3] on the occasion of the marriage of a daughter, or the purchase of an estate, or the cultivation of a field.

EQUITY as a means of development of the Roman legal system was subsequent to the period of pontifical interpretation and that of the "Veteres" or earlier jurists. The principles of Equity were chiefly applied and developed in the form of magisterial interpretation by the Praetor in his Edict under the influence of the *jus gentium*[4] and the conception of the *jus naturale*;[5] but they were also developed, although in a much lesser degree, by those other higher Roman magistrates who possessed, in virtue of their offices, the right of issuing authoritative edicts (*jus edicendi*). The influence of the Praetor upon the development of the Roman Law, although indirect, was yet more direct than that of the jurists by reason of the quasi-legislative power involved in his *imperium*.[6]

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[1] *De Orat.* i. 48; *Pro Murena*, ix. 19.

[2] See Hunter, *Roman Law*, 54, 55; Sohm, *Inst.* 62, s. 15; and *cf.* Moyle, *Inst.* 45, and note 3.

Moyle attributes to *cavere* the strict signification generally ascribed to *scribere*, namely, the preparation of technical legal documents; and, following Kruger (*Geschichte des Röm. Rechts*, 50), supposes that *scribere* signified the giving of *written* advice to clients and judges; whilst to *agere* he gives the signification of the taking of the formal steps required for the bringing or defending an action, which is the meaning usually ascribed to *cavere*.

[3] Cicero, *De Orat.* 3. 33.

[4] See Chapter II., Section IV. (1).

[5] *Ibid.*

[6] See *ante*, p. 29.

Legislation as the principal means of development of the Roman Law succeeded both Interpretation and Equity, which in the Imperial period were themselves superseded by direct law-making on the part of the Emperor, there being by that time no longer any necessity to conceal the changes made upon the law by the employment of a specious interpretation or of elaborate fictions.

The Valentinianian Law of Citations (426 A.D.)

This was the last and the most important of several attempts made at different times to reconcile, by legislative means, the conflicting opinions of authorised jurists. The Emperor Hadrian had attempted to solve the difficulty by enacting that the opinions (*responsa*) of the authorised jurists, when unanimous, should be binding as law, but where the jurists differed the judge might exercise his discretion in the selection of an opinion.

In course of time the difficulty of reconciling conflicting opinions increased, notwithstanding the enactment of Hadrian, owing to the practice, which had become established, of regarding the general legal writings of jurists possessing the *jus respondendi* as themselves constituting authoritative law—i.e. *jus*—in place of the original law in the form of *leges*, *senatus-consulta*, or *edicta*. It was accordingly sought to remedy this difficulty by limiting, by legislative means, those legal writings which should be regarded as authoritative. The Emperor Constantine, in 321 A.D., enacted that the "Notes" of Ulpian and of Paul upon the writings of Papinian, whose pupils they had been, should possess no authority. In 327 A.D., however, owing to the discredit thus cast in the popular mind upon the general works of Paul and of Ulpian, the Emperor Constantine expressly granted authority to the independent writings of Paul, and, in particular, to his "Sentences" (*Sententiae*). The legal authority of the jurists continued in that position for about a century thereafter, until, in 426 A.D., a more detailed and decided attempt to determine the authority of the jurists and to finally solve the difficulties of their citation was made in the form of a law enacted by Theodosius II. and Valentinian III., which is generally known as the "Valentinianian Law of Citations."[1] This statute confirmed and made permanent the authority of the writings of Papinian, Paul, Gaius, Ulpian, and Modestinus, and also the opinions of other jurists quoted with approval by them, provided the quotation was verified by the original text; when the opinions differed the judge was to be bound to follow the opinion of the majority; if opinions were equally divided the opinion of Papinian was to prevail if there

[1] See, for the text, Theodosian Code (Cod. Th.), i. 4, 3.

was one by him upon the point, but otherwise the judge (*judex*) was to be entitled to exercise his discretion in the selection of an opinion. The invalidity attached to the "Notes" of Paul and Ulpian by Constantine in 321 A.D. was, at the same time, re-enacted.

This "Law of Citations" of Valentian III. is noteworthy as marking, in the words of Sohm,[1] "the completion for the time being of that development which had commenced with the *responsa* of the old pontifices and the *jus respondendi* of Augustus." It officially fixed the limits of classic legal literature.

The *Digest* of Justinian was, rather more than a century later (533 A.D.), compiled from the writings of the jurists who had been authorised by the Valentinianian Law of Citations, but the compilers were not bound to defer to the opinion of any particular jurist, or to give preference to the opinion of a majority; on the contrary, they were directed to make selections from the writings of the authorised jurists entirely upon grounds of what they considered intrinsic merit; the pre-eminent authority of Papinian was not insisted upon; and the "Notes" of Ulpian and Paul, and also of Marcian upon Papinian, which had been invalidated by Constantine, were expressly included within the sources from which the compilers were to be entitled to draw their materials.[2]

Section IX.—General Organisation of the Roman State

The Roman State (*Civitas Romana*) was, in its social organisation, what is known as "patriarchal," in which the family or the household, and not the individual person, is the unit of the State.

The head and representative of the family was the *paterfamilias*, or "family father." He originally possessed an absolute legal authority over both the persons and the property of all who were subject to his paternal power, which was known as *patria potestas*, but which became, in course of time, much restricted.[3] The *paterfamilias* alone possessed any legal rights, and within the limits of the family he was the sole judge of the conduct of its members and the high priest of the family in the celebration of its peculiar sacred rites.

Originally only patricians could be members of a Roman Family (*familia*) and of a Roman *gens*, which latter was an aggregation of several

[1] Sohm, *Institutes of Roman Law*, 85, s. 17 (3rd ed., 119).

[2] See upon the "Law of Citations," Muirhead, *Roman Law*, 362 *et seq.*; Hunter, *Roman Law*, 69 and 78, 79; Walton, *Historical Introduction to the Roman Law*, 148 *et seq.* (2nd ed., 293); Moyle, *Institutes of Justinian*, 66 *et seq.*; Sohm, *Institutes of Roman Law*, 84 (3rd ed., 118); Poste, *Institutes of Gaius*, 4th ed., 10.

[3] See *post*, Part II., under the "Law of Persons."

families or households the members of which were more or less closely related, and who claimed descent from a common male ancestor, bore a common family name, and had common peculiar family rites and religious observances. An aggregation of *gentes* or clans formed a *curia* or ward or parish. The members of a *gens* were known as *gentiles*, and these of a *curia* were styled *curiales*. The *Comitia Curiata* was an assembly of the *curiales* as a legislative body, and was the earliest of the Roman popular assemblies.[1]

The Roman State was a federation of *gentes* or clans, just as a *gens* was an aggregation of several *familiae* or households.

The family or household proper that was subject to the *potestas* of the *paterfamilias* included (1) all the latter's legitimate descendants who had not been released from his authority by such circumstances as emancipation,[2] adoption into another family or, in the case of females, marriage; (2) all persons brought into the family by adoption,[3] and (3) the wives and children of unforisfamiliated male members of the family.

For long plebeians were rigidly excluded from becoming members of patrician families or clans, but the families of the plebeians themselves were constituted and regulated upon the same principles and rules as those of the patricians.[5] In time, however, as old patrician *gentes* died out and "families" became extinct new ones were created, and in this way a plebeian element was gradually and increasingly introduced into the old organisation.[6]

In its political organisation the Roman State consisted of a dominant aristocracy called the "patricians" (*patricii*) and a subordinate democracy or commonalty known as the "plebeians" (*plebs*). The patricians originally possessed an exclusive monopoly of political rights, and the earlier history of Rome is largely occupied with the struggles between the patricians and the plebeians for social and political recognition and power; until the time of the "Servian Reforms,"[7] indeed, the patricians alone constituted the "Roman people" (*populus Romanus*).[8] The struggles between the two orders only terminated with the passing of the *lex Hortensia* in 287 B.C., which marked their final reconciliation and fusion, and may be said to also mark the real commencement of Rome's

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[1] See on the various *Comitia*, *ante*, p. 19.

[2] See *post*, Part II.

[3] See *post*, Part II.

[4] Upon the meaning of the Roman term *familia*, see *post*, under "Law of Persons"; also Muirhead, *Roman Law*, p. 24, note 2, and Ortolan, *History of Roman Law*, 471.

[5] *Cf.* Hunter, *Roman Law*, 6; Muirhead, *Roman Law*, 12, 13.

[6] See upon the Roman family organisation, Muirhead, *Roman Law*, ch. iii. s. 9.

[7] See on the "Servian Reforms," Muirhead, *Roman Law*, 55-75; Hunter, *Roman Law*, 9 *et seq.*; Moyle, *Inst.* 6, Introduction; Walton, *Roman Law*, 2nd ed., ch. ix.

[8] *Cf.* Hunter, *Roman Law*, 4, 9.

ultimate greatness, for she was thereafter a united state no longer torn and weakened by internal dissension and strife. The first step towards the final fusion of the two orders was the passing of the "Canuleian" law (*lex Canuleia*) in 445 B.C., which gave to plebeians the *jus connubii* or the right of lawful marriage according to the forms of the strict *jus civile*, and legalised marriages between patricians and plebeians; between that date and the passing of the "Hortensian" law all the highest offices and magistracies in the State were opened to the plebeians, and they were finally made eligible for the office of Pontifex Maximus in 254 B.C.[1]

The subordinate Roman democracy was originally composed of two great classes, the "clients" (*clientes*) and the plebeians or *plebs* proper. Very little is known with certainty of the class of "clients"; they are supposed to have consisted of free men who, for purposes of protection, had attached themselves to particular patrician Families of which they were dependants, and the heads of which were their "patrons" (*patroni*). Certain mutual rights and obligations of protection and of service came in time to be attached by custom, though not by law,[2] to the relationship of patron and client; the patron owed a general protection of the interests of the client, while the latter was bound generally to uphold and further the interests of the patron.[3] The relationship of patron and client began to lose its importance towards the end of the Regal period, largely through the operation of the Servian Reforms and the subjection of clients to military service under that scheme of reorganisation.[4] The "clients" stand midway between the patricians and the plebeians, and, indeed, were classed politically as plebeians, if they were not so in fact.

The plebeians (*plebs*) proper, however, were independent freemen, who were not dependent upon any particular patrician family, but who, although free originally, possessed no political rights in the State, or recognition and protection from the Law.

The Roman *plebs* are supposed to have been composed of such elements as free voluntary immigrants into and settlers in Roman territory, inhabitants of conquered territories,[5] manumitted slaves; and, until the passing of the "Canuleian" law in 445 B.C., the children of patricians and plebeians, or patricians and clients, would naturally belong to that order.

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[1] See *ante*, note 3, at p. 29.

[2] *Cf.* Sohm, *Institutes of Justinian*, s. 21 (4). See also Sohm, 3rd ed., 38, 39.

[3] *E.g.* by contributing towards the expenses of litigation, or of a public office or ransom, or a dowry.

[4] See Moyle, *Institutes of Justinian*, pp. 5-7.

[5] *Cf.* Moyle, *ut supra.*

The true origin of the *plebs*, however, is still a matter of "conjecture,"[1] and it is further uncertain whether the distinction between the patricians and the plebeians was not one based upon fundamental racial as well as upon social differences.[2]

Section X.—Division of the Roman Empire and its Effect upon the Subsequent Course and Development of the Roman Law.

In 330 A.D. the Emperor Constantine established Byzantium as the capital city of the Roman Empire, instead of Rome, and, at the same time, re-named it Constantinople. This was the first real step towards the division and ultimate disruption of the Roman Empire.

In 395 A.D. the Emperor Theodosius I. divided the Empire, before his death, into two separate sovereignties, the one of the East with Constantinople as its capital, and the other of the West with Rome as its capital, and he gave the two sovereignties respectively to his two sons Arcadius and Honorius. From that time the Roman Empires of the West and of the East were separate, and their history ran separate courses; they were only twice again united under one ruler, and then only for a short period; the first occasion was when the conquests of Belisarius in Italy in 539 A.D. made Justinian for a short time actually ruler of the Western as well as of the Eastern Empire, and the second occasion was in 553 A.D. after the destruction of the Ostrogothic kingdom in Italy by Narses, the other great general of Justinian's reign and the rival and successor of Belisarius. This temporary conquest of Italy, however, had the important result of establishing Justinian's law in the West in rivalry with the Romano-Barbarian system known as the *Lex Romana Visigothorum*, or "Alaric's Breviary" (*Breviarium Alarici*), over which it ultimately prevailed upon the revival of the study of the Roman Law in Italy in the twelfth century.[3]

The Western Roman Empire fell finally in 476 A.D. when Romulus Augustulus, the last of the Emperors at Rome, was deposed. The dis-

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[1] Some authorities, including Mommsen, are of opinion that the *plebs* proper originated in the decay of clientage, before which time all non-patricians were "clients" of patrician families (see Muirhead, *Roman Law*, p. 13, note 4). *Cf.* also Moyle, *Institutes of Justinian*, 5.

[2] Upon the patricians, clients, and plebeians generally, see Muirhead, *Roman Law*, pt. i. ss. 2, 3, and 4; Poste, *Institutes of Gaius*, 4th ed., Introduction, s. 7; Walton, *Historical Introduction to Roman Law*, ch. iv. ss. 3, 5 (2nd ed., 60); Moyle, *Inst.*, *ut supra*; Sohm, *Inst.*, 3rd ed., 38, 39.

[3] See p. 47; also *cf.* Hunter, *Roman Law*, 98; Sohm, *Inst.* 95 (3rd ed., 129).

ruption of the Western Empire, however, had been in progress since 410 A.D., when the Goths had actually battered down the walls of Rome itself, and for six days sacked the city.[1]

Notwithstanding the barbarian conquests of the territories of the Western Empire in Italy, Spain, and Gaul, the language, laws, and administrative system continued essentially Roman in character and spirit, and some of the barbarian Gothic kings, such as Theodoric, King of the Ostrogoths (475 A.D. to 526 A.D.), who had conquered Italy in 493 A.D., even recognised the supreme authority of the Emperor of the East at Constantinople, and ruled under his nominal suzerainty.

Section XI.—Romano-Barbarian Codes of Law

Certain of the Gothic conquerors of the Western Roman Empire promulgated, along with their own peculiar tribal laws, codes of Roman Law applicable to their Roman subjects.[2] These collections are known as the "Romano-Barbarian Codes" (*Leges Romanae Barbarorum*) as distinguished from the *Leges Barbarorum* or collections of their own peculiar tribal laws possessed by the Gothic invaders, and applicable solely to themselves.[3] Three collections of Romano-Barbarian law are notable under the respective names of (1) "Theodoric's Edict" (*Edictum Theodorici*); (2) the "Romano-Burgundian Law" (*Lex Romana Burgundionum*);[4] and (3) the "Roman Law of the Visigoths" (*Lex Romana Visigothorum*), or "Alaric's Breviary" (*Breviarium*[5] *Alaricianum* or *Alarici*).

The last-named of these collections was much the most important, and was largely used throughout Western Europe from the sixth to the twelfth century; it has been styled the *Corpus Juris Civilis* of the West just as Justinian's compilation was the *Corpus Juris Civilis* of the East, and from it was derived, until the twelfth century, such knowledge of the Roman Law as then prevailed in Europe. "Alaric's Breviary" was only superseded in Western Europe by the discovery,

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[1] See upon the barbarian conquest, *Italy and her Invaders* (376 A.D. to 814 A.D.), by Hodgkin (2nd ed.); *Roman Society in the Last Century of the Western Empire*, by Samuel Dill (2nd ed.), 1910.

[2] This was owing to the prevalent conception of laws as purely personal and not territorial. There might be many people within a certain territorial region each governed by different personal systems of law.

[3] *Cf.* Sohm, *Inst.* 93 (3rd ed., 126).

[4] This has sometimes been erroneously styled *Papianus* or "Papian," as a contraction for *Papinianus* (see *ibid.*, p. 48, and note 5).

[5] The term *Breviarium* signifies an abridgment.

and subsequent revival of the study and knowledge of the text of Justinian's *Corpus Juris Civilis* in the twelfth century.

THEODORIC'S EDICT (*Edictum Theodorici*) was an attempt to set out, in a succinct form, the principal practical provisions of the Roman Law so far as they were capable of being applied equally to both Gothic and Roman subjects.

This compilation was made at the instance of Theodoric, King of the Ostrogoths (475 A.D. to 526 A.D.), about 500 A.D. The materials of this collection were drawn from the Hermogenian, Gregorian, and Theodosian Codes, and from the later *Novels*, and the "Sentences" of Paul. "Theodoric's Edict" is, however, unsystematic in its arrangement, and has the further disadvantage of having been compiled from summaries or explanatory *résumés* of the law,[1] rather than from the original sources themselves. It touches upon all branches of law, both public and private, but deals principally with public law and procedure, and "Theodoric's Edict" was intended to apply to both the Roman and the Gothic subjects of the Ostrogothic kingdom.[2]

With the destruction of the Ostrogothic kingdom and the re-conquest of Italy by Narses in 553 A.D. the Edict of Theodoric was replaced throughout Italy by the Justinianian Law.

The ROMANO-BURGUNDIAN LAW (*Lex Romana Burgundionum*) was a collection of Roman law compiled for the benefit of the Roman subjects of the kingdom of the Burgundians, which is generally considered to have been published by King Sigismund about 517 A.D., in pursuance of a promise made by his father, King Gundobald, to that effect when in 501 A.D. he promulgated a code of native law known as *Lex Burgundionum*, or, otherwise, as *Gundobada*.[3]

The *lex Romana Burgundionum* was superior to the Edict of Theodoric in respect that it attempted to follow to a greater extent the lines of the Roman originals. It treated of private and of criminal law and of judicial procedure in forty-seven titles. Its materials were drawn from the Theodosian Code and the post-Theodosian *Novels*, and from the "Sentences" (*Sententiae*) of Paul and a work of Gaius other than his *Institutes*; it was not a mere collection of extracts of statutory and of jurisprudential law, but was consecutive and homogeneous in its character, so far as it went, being "something between a text-book and a code."[4]

This collection was long erroneously known as *Papianus* or "Papian."[5]

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[1] Such as had sprung up in the literature of the fifth century in connection with the teaching of law (Sohm, *Inst.* 93; 3rd ed., 127).

[2] This was probably rendered possible by the fact that, containing, as Theodoric's Edict did, so little private law, its provisions did not in any way interfere with the personal law prevailing amongst the Goths in pursuance of their own peculiar customs. *Cf.* Muirhead, *Roman Law*, 371.

[3] Some authorities consider that the *lex Romana Burgundionum* may have been published by Gundobald himself, the date 517 A.D. being merely speculative. *Cf.* Muirhead, *Roman Law*, 373.

[4] Muirhead, *ut supra*, 373.

[5] This name is said to have originated in the fact that, in the combined and consecutive MSS. of the *Breviarium Alarici* and *lex Romana Burgundionum* used by

Although the *Lex Romana Burgundionum* was, in a certain respect, superior to the "Theodoric Edict," yet both of these collections were, in the words of Sohm,[1] "lame attempts" setting forth only the coarsest parts of the materials that they sought to preserve, and entirely lacking the form, the ideas, and the spirit of the true Roman jurisprudence. The *Lex Romana Burgundionum* was short-lived, and ceased to be effective when the Burgundian kingdom was overthrown by the Franks in 534 A.D.

The LEX ROMANA VISIGOTHORUM, otherwise known as *Breviarium Alaricianum* (or *Alarici*) or "Alaric's Breviary," was the most important of all the Romano-Barbarian Codes. It purported to be a digest of the law applicable to the Roman subjects of Alaric II., King of the Visigoths, or West Goths (484 A.D. to 507 A.D.), and was published at Aire, in Gascony, in 506 A.D. It contained both statute "law" (*leges*) and jurisprudential law (*jus*); the former is represented by some four hundred of the enactments of the Theodosian Code and some thirty of the post-Theodosian "Novels," whilst the latter is represented by an abridgment, in two books, of the *Institutes* of Gaius,[2] the "Sentences" of Paul, portions of the Gregorian and Hermogenian Codes, and the first book of Papinian's "Responses," all of which, with the exception of the abridgment of Gaius, were accompanied by an "interpretation" qualificative of the application of the text.

Owing to the fact that Spain, and that part of Gaul lying south of the Loire which belonged to the Visigoths, had enjoyed a practical immunity from Germanic invasion and conquest, the true spirit of the Roman jurisprudence still survived there after the fall of the Western Empire to a greater extent than anywhere else in Europe except in Italy, and the *Lex Romana Visigothorum*, having been prepared by a special Commission which comprised Roman jurists, embodied that spirit to a considerable degree.

From the sixth to the twelfth century "Alaric's Breviary" exercised an important influence throughout Europe, and was, indeed, the *Corpus Juris Civilis* of the West. It was from the *Lex Romana Visigothorum* that such knowledge as Europe then possessed of the Roman Law had been derived when the "glossators"[3] revived the study of the Justinianian Law in Italy in the twelfth century.

The supersession of Alaric's *Corpus Juris* by that of Justinian upon the revival, in the twelfth century, of the study of the pure Roman Law in Italy, where Justinian's system was already in force and in rivalry with the law of the *Breviarium Alarici*, was undoubtedly due to the intrinsic merits of the *Corpus Juris Civilis* of Justinian; for the *Lex Romana Visigothorum* did not contain those masterpieces of the

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Cujas (otherwise Cujacius), the great scholastic jurist of the sixteenth century who became professor at Bourges in 1550, the last words of the *Breviarium*, viz. "Pap. Lib. 1," were placed in such a position as to be mistaken for the title of the *Lex Romana Burgundionum*. *Cf.* Mackenzie, *Roman Law*, 36, note 5; and Sohm, *Inst.* s. 18, p. 94, note 5 (3rd ed., s. 22, p. 128).

[1] Sohm, *Inst.* s. 18, pp. 92, 93 (3rd ed., s 22, pp. 126, 127).

[2] Known as the "Gothic Epitome" of Gaius.

[3] See *post*, p. 52, note 2.

Roman jurisprudence which constitute at once the strength and the permanent value of the Justinianian system. The compilers of "Alaric's Breviary" had rejected as too difficult and too unintelligible the works of the Classical Jurists, and even such of the work of Gaius as they utilised was not only of an elementary character, but also in a much abridged form.

"Alaric's Breviary" was unsuited to the requirements of expanding European civilisation with its increasingly complex social and commercial conditions, whereas the *Corpus Juris Civilis* of Justinian commended itself as a foundation for the law of the modern world, containing as it did the matured principles of the pure Roman jurisprudence, and, especially, the developed principles of the law of contract and obligations generally, which alone would have invested it with the highest permanent value.[1]

Section XII.—"Graeco-Roman" or "Byzantine" Law

The Eastern Roman Empire continued to exist for nearly nine centuries after the death of the Emperor Justinian in 565 A.D. until it was finally overthrown through the capture of Constantinople, the capital city, by the Turks in 1453 A.D. Throughout only about half of that period, however, did the law in force remain even nominally that of Justinian, or as modified by the "Constitutions" of subsequent Emperors. By the close of the eleventh century the Justinianian Law had fallen into disuse, and had been practically superseded by a system of what is known as "Graeco-Roman" or "Byzantine" Law. This result was chiefly brought about by the fact that the language of the Eastern Empire had gradually changed from Latin to Greek, and the Roman Law had come to be studied from Greek translations, and from Greek commentaries by Greek jurists.

About the close of the ninth century A.D. the Emperor Leo, known as "the Philosopher," who reigned from 886 A.D. to 911 A.D., promulgated, in the Greek language, about 890 A.D., what purported to be a revised and rearranged version of the Justinianian Law, which latter was still, at that period, the nominal ultimate source of the Law of the Empire.

The Code or Collection of Law published by the Emperor Leo was the most important part of the whole system of Graeco-Roman Law, and is known as the *Basilica* or *Basilicae*.[2] Constantius Porphyrogenitus

[1] Upon the Romano-Barbarian Codes, see Muirhead, *Roman Law*, 371 *et seq.*; Mackenzie, *Roman Law*, 35 *et seq.*; Ortolan, *History of Roman Law*, 343 (s. civ.); Sohm, *Institutes of Justinian*, s. 18, p. 92 *et seq.* (3rd ed., s. 22, p. 126 *et seq.*); Moyle, *Institutes of Justinian*, 4th ed., 71; Walton, *Historical Introduction to Roman Law*, ch. xxiii. (2nd ed., ch. xxix.).

[2] The *Basilica* was the completed collection of law originally begun about 878 A.D. by the Emperor Basil or Basilius "the Macedonian." The name *Basilica* is a con-

(906 A.D. to 911 A.D.), the son of the Emperor Leo, extended the *Basilica* by means of an official commentary, compiled from the writings of the sixth-century jurists, which is now known as the *Scholia* to the *Basilica*, and which takes the form of annotations, explanations, and interpretations of the text, and, in some instances, of conflicting decisions upon it.[1] Both the *Basilica* and the *Scholia*, as well as the *Hexabiblos* or *Promptuarium* of Harmenopulus,[2] have afforded considerable exegetical assistance in the modern study and interpretation of the Justinianian Law, and were largely utilised by Cujas, or Cujacius, the founder of the historical school of Roman jurisprudence in France in the sixteenth century.[3]

> The *Basilica* contains extracts from the *Digest*, *Institutes*, *Code*, and *Novels*, and also post-Justinianian "Constitutions." The collection consisted of sixty books, subdivided into titles, and followed the general lines of Justinian's *Code*, except that the whole law upon any particular subject was arranged consecutively as drawn from the various statutory or juristic sources, and amended, adapted, or extended, where it was considered necessary, by the terms of the *Basilica* itself. The extracts from the Justinianian books in the *Basilica* are, however, for the most part, drawn from Greek translations, abridgments, and commentaries, and not from the original texts, all knowledge and study of which had by that time practically ceased.

The *Basilica*, when first published, practically superseded the Justinianian Law, being written in Greek and published with Imperial authority, but it was not until near the close of the eleventh century that the supersession was formally recognised.

The *Basilica* continued to be nominally the authoritative law for the Eastern Empire until its final overthrow in 1453 A.D., when the Koran superseded the Byzantine Law, for the most part, in those regions that had formed the Empire of the East. Long before that time, however, the place of the *Basilica* had come to be taken, in practice, by various Greek epitomes, the last of which was the *Hexabiblos* or *Promptuarium* of Constantine Harmenopulus,[4] which was published

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traction for either τὰ βασιλικὰ νόμιμα or αἱ βασιλικαὶ διατάξεις, signifying "the Imperial laws" or "Constitutions" (*Constitutiones imperatoriae*). Some writers have been of opinion, though now generally regarded as erroneously, that the name *Basilicae* was adopted in honour of the Emperor Basil of Macedonia by reason of his having been the originator of the work.

[1] The term *scholia* signifies "annotations." In Graeco-Roman legal literature a distinction has been drawn between the *scholia* of the jurists of the sixth century and those of jurists of later date. The former have been particularly styled *antiqua*, and the latter *scholia* proper; and similarly the sixth-century jurists have been styled *antiqui* as distinguished from the *scholiasts* simply so called, or jurists of later date.

[2] See *infra*.

[3] See *ante*, p. 48, note 5.

[4] Harmenopulus was a judge at Thessalonica, and he died at Constantinople in 1382 A.D.

in 1345 A.D. This work was a comprehensive collection of post-Justinianian Graeco-Roman Law adapted to the legal requirements of the age, and it was widely known and esteemed as a classic legal manual throughout the Eastern Empire during the last century of its existence, and even in the West to some extent, whatever may have been its actual merits as a legal work.[1]

The fall of the Eastern Empire in the middle of the fifteenth century caused a great migration westwards from Constantinople into Italy and France of Graeco-Roman or "Byzantine" literature, law, and art, which ultimately led to that general revival and development of intellectual activity in Europe known as the Renaissance, and which has so materially affected and determined the course of modern history. The study of the Roman Law and of the original Roman texts shared in the general impetus given to learning after the fall of the Eastern Empire; but long before that time the study of the Justinianian Law had recommenced in Italy. As early as 1120 A.D. the famous School of Law was founded at Bologna by Irnerius, the first of the glossators,[2] and by its fame not only attracted large numbers of students from all parts of Europe, but also disseminated widely an interest in and a knowledge of the pure Roman Law. It was, indeed, from Bologna that the revived knowledge and study of the original and pure Roman texts emanated and spread over modern Europe.

The knowledge of the pure Roman Law was never entirely lost in Italy, notwithstanding the barbarian overthrow of the Western Empire.

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[1] Ortolan styles the *Hexabiblos* a "lucid exposition" and a "methodical composition," whereas Bruns refers to it as "a miserable epitome of the epitomes of epitomes"! The codes of statutory Graeco-Roman Law prepared and published at different times with Imperial authority were the *Ecloga* (740 A.D.), *Prochiron* (870 A.D.), *Epanoge* (*circa* 879 A.D.), and *Basilica* (*circa* 890 A.D.), which are generally ascribed respectively to the Emperors Leo "the Isaurian," Basil "the Macedonian," and Leo "the Philosopher." Upon these collections a great mass of literature was subsequently produced by Greek jurists by way of commentary, interpretation, or adaptation, ending with the *Hexabiblos* of Harmenopulus.

See upon the Graeco-Roman or Byzantine Law, Ortolan, *History of Roman Law*, ss. cxv.-cxviii.; Hunter, *Roman Law*, ch. v.; Muirhead, *Roman Law*, 402; Orsier, *Histoire de Droit Civil Graco-Romain*; Zachariae, *Jus Graeco-Romanum*; Mortrueil, *Histoire du Droit Byzantin*.

[2] The "Glossators" were so styled from the fact that these jurists were in the habit of inscribing interlinear and marginal notes, known as "glosses," upon the Justinianian manuscripts, by way of explanation of, or commentary upon, the text. In some cases the "gloss" was so extensive and so elaborate as to be accorded even a greater authority than the text itself.

The School of the Glossators flourished for about a century and a half, terminating with the death of Accursius in 1260 A.D., and was succeeded until the end of the fifteenth century by that of the "post-glossators" or "scholastic" jurists, "whose pedantry, prolixity, and verbal subtlety," however, "have added little to the sum of human knowledge and enlightenment." *Cf.* Mackenzie, *Roman Law*, 39.

Both in Italy and in Gaul the knowledge of the Roman Law, whether ante-Justinianian or Justinianian, was preserved through three distinct agencies, namely, the principle of the personality of the laws,[1] the authority of the Church,[2] and the intrinsic merits of the system itself.[3]

After the conquests of Belisarius and of Narses in Italy in the sixth century the Justinianian Law obtained a permanent footing there, and from that time onwards, despite all the various subsequent territorial changes, it existed in the West along and in rivalry with the Romano-Barbarian Law of Alaric's "Breviary."[4] Upon the revival of the study of the Roman Law in Italy in the twelfth century, and the establishment of the Bologna School of Law, the Glossarists deliberately adopted the *Corpus Juris Civilis* of Justinian as the basis of their studies in preference to the Gothic Code, and upon that foundation the whole great superstructure of the modern scientific study of the Roman Law has been built up.[5]

From the twelfth to the end of the fifteenth century the science of law was, for the most part, confined to the schools of Italy, but thereafter its study passed, succeeding to the schools of France, the Netherlands, Spain, and Germany, with which are associated the names of such great civilians as Cujacius, Grotius, Vinnius, Godefroy, Heineccius, Porthier, Hugo, Thibaut, Niebuhr, and Savigny.

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[1] See "Romano-Barbarian Codes," *ante*, p. 47, note 2.

[2] *Cf.* Hunter, *Roman Law*, 98.

[3] *Cf.* Sohm, *Institutes of Roman Law*, 95 (3rd ed., 129).

[4] Sohm, *ibid.*

[5] Upon the revived study of the Justinianian texts, and the rise of the Bologna School, etc., see Ortolan, *History of Roman Law*, s. cxxiv.; Muirhead, *Roman Law*, 405 *et seq.*; Mackenzie, *Roman Law*, 38 *et seq.*; Hunter, *Roman Law*, ch. vi. p. 98 *et seq.*; Sohm, *Inst.*, *ut supra*.

CHAPTER II

Section I.—Meanings of the Term Jus

The word *jus* possessed a variety of meanings in the Roman Law. The original and, at the same time, the widest signification of the term was that of Law generally, as the rule of action (*norma agendi*),[1] but it also signified, in a narrower sense, a special right or faculty (*facultas agendi*) sanctioned by the general rule of action, such as, *e.g.*, *jus itineris*, or a right of way.

Moreover, the term *jus* was sometimes employed to connote "strict law" as opposed to "equity," or to signify "right" as opposed to "wrong." It might also be used to mean either "justice" itself, as in the expression *jus reddere*, "to dispense justice,"[2] or "the place where justice is dispensed,"[3] as in the expression *in jus vocatio*, signifying the bringing of a defendant into Court; or it might be employed with reference to proceedings *in jure*, before the Praetor, as distinguished from proceedings *in judicio*, or before a *judex* or judge.

The term *jus* was, moreover, sometimes used to mean "authority" or "control," as in the expressions *sui juris* and *alieni juris*, or simply a special bond or relationship, as in the expressions *jus sanguinis* or *jus cognationis*, signifying the tie of blood, and *jus affinitatis*, connoting relationship by marriage:[4] it was also employed in a general sense in contradistinction to *fas*; in which last sense *jus* signified law that was declared by human agency as opposed to that which is divinely inspired.

In its strictly legal sense, however, the term *jus* has two principal meanings—a general and a special one; it signified either (1) law generally, as the whole mass of rights and duties recognised and protected by legal remedies; or (2) any particular faculty or privilege accorded by law to a particular person with a corresponding duty imposed by law upon another particular person—in other words, a legal "right."

A legal "right," in the narrower and strictly legal sense of the

[1] *Cf. Dig.* i. 1, 11, "that which is, under all circumstances, fair and right."
[2] *Ibid.*
[3] *Cf. Dig.*, *ut supra.*
[4] *Cf. Dig.* i. 1, 12.

word *jus*, and a legal duty, are, in the sphere of private law, correlative terms, the one necessarily connoting and involving the existence of the other.[1]

Section II.—General Definitions of the Roman Law

The *Institutes* of Justinian commence with various general definitions, which are also contained in the *Digest*. Thus "Justice" (*justitia*) is defined as "the constant and perpetual wish to give every one his due."[2] "Jurisprudence" (*jurisprudentia*) is "the knowledge of things divine and human, of the just and the unjust."[3] This definition of jurisprudence has no scientific value, but, taken as it was from the *Rules* of Ulpian, it merely repeated a rhetorical commonplace of the Stoic philosophers;[4] it may be more freely taken as stating that *Jurisprudentia* is "the science of right and wrong"; in other words, "Jurisprudence" (*jurisprudentia*) is the science or knowledge of *jus*, or law generally.

Moreover, *Jus*, or law generally, is based upon certain general precepts or maxims, which "precepts of the law" (*praecepta juris*) are stated as "to live honestly, to injure no one, and to render everyone his due."[5]

Section III.—General Divisions of Law

Justinian, following the distinction originated by the Roman jurists, divided the study of Law generally (*jus*)—*i.e.* positive law—into two great parts, namely "Public" Law (*jus publicum*) and "Private" Law (*jus privatum*). "Public" Law was that part of the law which related to the constitution, government, and general administration of the Roman State, and to the regulation of the relations between the State as a whole and individual persons in the State.

"Private" Law was that part of the law which was concerned with the relations of individual persons, in their private capacities amongst themselves (*inter se*).[6]

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[1] See upon the term *jus* and its various meanings, Clark, *Practical Jurisprudence*, 14-20; Muirhead, *Roman Law*, 18; Hunter, *Roman Law*, 116; Sanders, *Institutes of Justinian*, 5. Modern philology derives the word *jus* from the Sanscrit *ju*, to join or bind, and deduces, as the true meaning of the word, "that which binds," or "the bond of society," or "that which is orderly or fitting" (Muirhead, *ut supra*).

[2] Justinian, *Inst.* i. 1 pr.; *Dig.* i. 1, 10; Monro, *Dig.* 5; Sanders, *Institutes of Justinian*, 5.

[3] Justinian, *Inst.* i. 1, 1; *Dig.* i. 1, 10, 2; Monro, 5; Sanders, 5.

[4] Hunter, *Roman Law*, 116.

[5] *Inst.* i. 1, 3; *Dig.* i. 1, 10, 1.

[6] *Inst.* i. 1, 4; *Dig.* i. 1, 1, 2.

This general division of law into "Public" and "Private" has been almost universally adopted by continental jurists, but not by institutional writers on English Law.[1]

"Public" Law (*jus publicum*) as conceived by the Roman jurists was concerned with "sacred rites (*sacra*), priests, and public officers,"[2] which, expressed more freely and from a modern point of view, would signify that it comprised ecclesiastical, constitutional, and administrative law, and also criminal law.

The *Institutes* of both Gaius and Justinian deal only with "Private" Law (*jus privatum*), or the law that is concerned with the regulation of the relations of individuals amongst themselves (*inter se*), with the exception of a short title at the end of the fourth book upon certain matters of criminal law.[3]

Justinian in his *Institutes* professes to treat "Private" Law (*jus privatum*) in the order of a threefold subdivision according as it deals with either Persons, Things, or Actions, in pursuance of a statement to the effect that all the law in use amongst the Romans had that threefold aspect.[4]

In effect "Persons" are, by this arrangement, regarded and treated as the *subject* of legal rights; "Things" as the *object* of legal rights; and "Actions" as the means of rendering legal rights effectual.

This threefold division of law has been the subject of much dispute,[5] and it is open to serious criticism upon scientific grounds.

Both Gaius and Justinian, in their *Institutes*, include Obligations within the category of "Things," while treating Actions as forming a distinct legal category, whereas Actions are just as much "things" as are Obligations in the sense that they are both modes of obtaining things.

Some jurists consider that Private Law ought to be divided into only the two categories of "Persons" and of "Things," and Obligations and Actions would naturally fall within the latter division and be dealt with according to the different matters to which they relate.

The threefold division of "Private" Law—to which, it may be mentioned incidentally, Justinian does not strictly adhere—was probably a traditional arrangement derived from the early pontifical jurisprudence[6] but confined to the institutional treatises of an elementary

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[1] *Cf.* Mackenzie, *Studies in Roman Law*, 59.

[2] *Digest*, i. 1, 1, 2.

[3] *Institutes*, iv. 18.

[4] Justinian, *Institutes*, i. 2, 12; Gaius, *Institutes*, i. sec. 8; *Digest*, i. 5, 1.

[5] Upon this threefold division of law see Moyle, *Institutes of Justinian*, 4th ed., 91.

[6] This is the view of Karlowa (*Röm. Rechtsgeschichte*, i. 725).

character;[1] nevertheless, whatever its scientific deficiencies, and however little actual value may have been attached to it by the Roman lawyers, this threefold arrangement has become fundamentally familiar to modern lawyers.[2]

The *Institutes* of Justinian deal almost entirely with "Private" Law (*jus privatum*), which, it is stated, may be regarded as being derived from three main sources, namely, "the precepts of natural law, of the law of nations, and of the civil law."[3]

The three sources of private law to which reference is thus made were known to Roman jurists as the *Jus Naturale*, the *Jus Gentium*, and the *Jus Civile*, respectively.

Section IV.—Jus Gentium, Jus Naturale, and Jus Civile

Subsection (1). Jus Gentium.—This was the term applied to that portion of the Roman Law which was applicable to citizens and non-citizens alike, in contradistinction to that portion of the Roman Law known in a special and narrower sense as the *jus civile*, which was peculiarly Roman and applicable only to the mutual dealings of Roman citizens and binding only upon such persons.

The rules of the *jus gentium* originated in the necessities of Rome's increasing commercial relations with foreigners (*peregrini*), and originally consisted of specific mercantile usages more or less common. Such special usages were, it is supposed, given effect to from time to time by the judges known as *recuperatores*[4] in the determination of particular disputes between citizens and foreigners prior to the creation of the office of Peregrin Praetor.[5]

It was in the Edict of the Peregrin Praetor, however, that the *jus gentium* first assumed a definite and permanent character, and came to signify in practice, and apart from philosophic speculation, those rules embodied in the Edict of the Peregrin Praetor for the regulation of commercial relations between peregrins amongst themselves (*inter se*), and those between peregrins and persons possessing the privilege of Roman citizenship, whether as citizens of the Roman State, or as allies to whom the right of *commercium* had been extended.[6]

In the later development of the Roman Law, when it was largely

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[1] Maine, *Early Law and Custom*, 367.

[2] *Cf.* Mackenzie, *Studies in Roman Law*, 60. See also *Trichotomy in Roman Law*, by Professor Henry Goudy, 1910.

[3] Justinian, *Institutes*, i. 1, 4; *Digest*, i. 1, 1, 2.

[4] See with regard to *recuperatores;* Hunter, *Roman Law*, 44, 51; Muirhead, *Roman Law*, 2nd ed., 210-212.

[5] *Cf.* Moyle, *Inst.* 35.

[6] See Moyle, *Inst.* 36.

influenced by philosophic speculation, the *jus gentium* came to be extended to include all those legal rules and principles based upon natural equity, and, as such, applicable generally to all peoples.

> In its philosophical aspect the *jus gentium* was regarded as a universal law of all mankind, common to all nations because of being based upon the general nature of things and the general sense of equity which prevails among all mankind and regulates their dealings with each other, and possessing a sanction in virtue of its inherent reasonableness.[1] Gaius and Justinian speak of the *jus gentium* as "the law which natural reason has settled among all men," or as "the common law of mankind," or as "the law in use among all nations."[2]
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> These vague philosophical generalisations must not, however, be taken too literally, for mere philosophic or scientific theory did not enter to any great extent into the development of the Roman Law, which was essentially empirical and practical. The *jus gentium* was, in fact, in no sense a collection or system of the law in general use amongst all peoples, but was essentially Roman Law for foreigners devised by Roman jurists, and developed by them to meet the practical exigencies of international commercial intercourse; it was "that part of the private law of Rome which was essentially in accordance with the private law of other nations."[3]

The rules of the *jus gentium*, embodied in the Edict of the Peregrin Praetor[4] (*praetor peregrinus*), gradually commended themselves to the Urban Praetor[5] (*praetor urbanus*) as equally applicable to regulate, upon lines broader and more equitable than those provided by the formalism of the strict *jus civile*, the commercial relations of Roman citizens amongst themselves; and, having been by degrees incorporated by the Urban Praetor in his Edict, these rules became ultimately part of the general law of Rome, binding upon citizens and non-citizens alike. By the close of the period of the Republic, as has been already observed,[6] the Edicts of both the *Praetor Urbanus* and the *Praetor Peregrinus* had become practically identical in all essential particulars, and constituted together the *Jus Praetorium*, which was nearly, and, to all effects, co-extensive and synonymous with the *Jus Honorarium*.[7]

During the Imperial Period the principles of the *jus gentium*, originally embodied in the Edict of the Peregrin Praetor upon purely

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[1] *Cf.* Sohm, *Inst.* 44, 46.

[2] See Gaius, *Inst.* i. 1; Justinian, *Inst.* i. 2, 1; Sanders, *Institutes of Justinian*, 8; Hunter, *Roman Law*, 117; Muirhead, *Roman Law*, 226.

[3] Sohm, *Inst.* 45 (3rd ed., 71).

[4] See *ante*, p. 29 *et seq.*

[5] See *ante*, p. 29.

[6] See *ante*, p. 31.

[7] See *ante*, p. 27.

empirical grounds, were largely developed and extended through the medium of the later scientific Roman jurisprudence and Imperial legislation.[1]

> The principal changes introduced into the Roman Law by the Praetor, and which so largely modified it and, at the same time, furthered its equitable development, were due to the influence of the *jus gentium*. This it was which led to the substitution for the formalism of the strict *jus civile* of rules and principles having as their object the ascertainment of and the giving effect to the real intentions of parties, and the application of the spirit rather than the letter of the law. It was also the influence of the *jus gentium* which brought about the transformation of the Roman law of intestate succession by the recognition of "cognatic" or blood relationship as the basis of the family and of inheritance in place of "agnatic" relationship or that purely artificial relationship created by the fact of subjection to the family authority (*patria potestas*) of a common family head or *paterfamilias*. To the influence of the *jus gentium* there must also be ascribed the recognition and protection of possession [2] (*possessio*), and equitable or "bonitarian" ownership as distinct from and opposed to "quiritarian" ownership or *dominium*,[3] which alone, in the estimation of the strict *jus civile*, constituted true legal ownership; the simplification of the means of making a testament in place of the old formal and clumsy procedure "by the brass and scales" (*par aes et libram*) peculiar to the strict law; and the recognition of informal contracts and informal modes of acquisition and transfer of property.
>
> It was in the sphere of contract that the influence of the *jus gentium* was most marked, and the so-called "real" and "consensual" contracts, by which an enforceable obligation was created apart from any formalities of word or deed, owed their recognition entirely to the *jus gentium*.[4]
>
> "In working out the *jus gentium*, *i.e.* those rules of natural equity which regulate the dealings between man and man, and in reducing these rules to a system of marvellous transparency and lucidity, which carries irresistible conviction by its form as well as its matter to the mind of every observer, in doing this, Roman Law has performed its mission in the world's history. And it was this achievement, successfully performed for all time to come, that not only fitted Roman Law for becoming the general law of the Roman Empire, but also endowed it with the power, when once it had emerged from the oblivion of centuries, to conquer the modern world."[5]

Subsection (2). JUS NATURALE.—The *Jus Naturale*, or "Law of Nature,"

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[1] *Cf.* Sohm, *Inst.* 47 (3rd ed., 73).

[2] See "Law of Things" (Part III.).

[3] *Ibid.*

[4] "From this law of nations (*jus gentium*) almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loan, and very many others" (Justinian, *Inst.* i. 2, 2).

[5] Sohm, *Inst.* 47 (3rd ed., 72, 73). Upon the Roman *jus gentium*, see Muirhead, *Roman Law*, 225-276, and authorities cited *ibid.*

as a term employed in the Roman Law, may be said to have signified, generally, that portion of the Roman legal system which was of universal application to all peoples by reason of being based upon and being an expression of an inherent reasonableness and sense of justice (*naturalis ratio*) implanted by Nature itself, and common to all mankind.[1]

The *Jus Naturale*, or "Law of Nature," was a conception derived by the Roman jurists from the "Stoic" philosophy of Greece, and it pertains to the period of the Later Republic and the Early Empire.

The Stoic philosophers sought, and professed to find, certain universal rules of both moral and physical application based upon both the common intellectual nature or reason of mankind, and also upon certain natural and physical instincts shared by man in common with the lower animals, such as, for example, the procreation of the species and the protection of offspring.

The Roman jurists, from the time of the classical jurists,[2] identified the conception of a law of Nature on the part of the Greek philosophers with the *jus gentium* which, in their own system, they found so sharply distinguished from the *jus civile* in that the principles of the *jus gentium* were of more or less general application to all peoples, whereas the *jus civile* was peculiar, and applicable only to a particular and limited community consisting of those special persons who possessed the privilege of Roman citizenship.

As employed in the Roman system, the term *jus naturale* is extremely vague, and in the *Corpus Juris Civilis* the distinction between *jus gentium* and *jus naturale* is not clearly drawn.

The terms are most frequently employed as synonymous, but at times they are differentiated. Thus it is stated in the *Digest*[3] that "law which natural reason has laid down for mankind in general is maintained equally by all men, and is called *jus gentium*, as being the law which all nations use"; and, again, it is observed in the *Institutes*[4] that "natural law (*jus naturale*) is termed the law of nations" (*jus gentium*).

On the other hand, the *Digest*, in another place,[5] states that "*jus gentium* is the law used by the various tribes of mankind, and there is no difficulty in seeing that it falls short of natural law, as the latter is common to all animated beings, whereas the former is only common to human beings in respect of their mutual relations"; and, again, the *Institutes* declare[6] that "the law of nature [*jus naturale*] is that law

[1] "Natural" law has been well defined by a modern jurist as "the dictates of reason with reference to human relations" (Lorimer, *Institutes of Law*).

[2] Moyle, *Institutes of Roman Law*, 38.

[3] *Dig.* i. 1, 9. See Munro's translation, 5.

[4] *Inst.* ii. 1, 11. See Sandars' *Institutes of Justinian*, 94.

[5] *Dig.* i. 1, 1, 4. See Munro's translation, 3.

[6] *Inst.* i. 2, pr. (Sandars' *Inst.* 7). *Cf.* to same effect, *Dig.* i. 1, 1, 3; Munro's translation, 3.

which Nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the air, the earth, or the sea. Hence comes that yoking together of male and female which we term matrimony; hence the procreation and bringing up of children." A distinction is still further drawn in another passage of the *Institutes*,[1] where it is observed: "The law of nations [*jus gentium*] is common to all mankind, for nations have established certain laws as occasion and the necessities of human life required. Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of Nature [*jus naturale*], for by that law all men are originally born free."

It may be said, speaking generally, that in the Roman system the terms *jus gentium* and *jus naturale* were, in fact, treated as synonymous, being only specially differentiated with regard to the institution of slavery, which was declared to be contrary to the natural law;[2] whereas the Romans, in their extending intercourse with other races, found that amongst all nations the institution of slavery was generally recognised.

The *jus naturale*, or "Law of Nature," as conceived by the Roman jurists, may be regarded as an ideal of justice to which actual, positive law ought, as far as possible, to approximate; and this ideal conception found expression in the principles of the *jus gentium*. The *jus naturale* may thus be considered as corresponding, in its general character, to the modern conception of equity.[3]

The terms *jus gentium* and *jus naturale* are not, however, exactly co-extensive, although generally identified with each other in the Roman system. Just as the *jus gentium* was of wider application than the *jus civile*, so the *jus naturale* was more comprehensive than the *jus gentium*.

The *jus civile* studied the interests of Roman citizens only; the *jus gentium* contemplated all freemen irrespective of nationality; but the *jus naturale* applied to all mankind.[4] In this view the *jus civile*, *jus gentium*, and *jus naturale* have been distinguished as the systems applying respectively to the citizen, to the freeman, and to the man.[5]

The distinction, such as it is, between the *jus gentium* and the *jus naturale* is purely speculative and of little, if any, practical value. They are distinguished from each other in that the one is based upon an abstract philosophical conception, whereas the other had its origin in the practical necessity that arose for the regulation of commercial inter-

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[1] *Inst.* i. 2, 2. See Sandars' translation, 8. *Cf.* to same effect, *Dig.* i. 1, 5; Munro's translation, 4.

[2] *Inst.* i. 2, 2.

[3] *Cf.* Paul, in *Dig.* i. 1, 11: "Natural law is that which is, in all circumstances, fair and right" (*Id quod semper aequum ac bonum est, jus dicitur, ut est jus naturale*).

[4] *Cf.* Muirhead, *Roman Law*, 281.

[5] Voigt, *Jus Naturale*, ii. 661.

course between Roman citizens and foreigners, and between foreigners themselves.[1]

Subsection (3). JUS CIVILE.—This term, as opposed to *jus gentium* or to *jus naturale*, signified in its strictest sense that portion of the Roman Law which was based upon ancient customary usage and early statutory enactment—for the most part consisting of the Twelve Tables—and which was, in its application, confined to those persons who possessed the privilege of Roman citizenship.

In its widest sense, however, the expression *jus civile* signified the law of any particular state;[2] but in a special sense, when employed without reference to any particular state, it signified, in a more limited sense, the law of Rome as distinct from that of any other state.[3]

The term *jus civile* was also used by the Roman jurists to connote so much of the Roman Law as was applicable and available only to Roman citizens, or to those persons who had been accorded the privileges of Roman citizenship, as distinguished from that portion of the Roman Law which was applicable to all persons, citizen and peregrin alike. In a still wider sense, moreover, *jus civile* signified the whole body of the Roman Law, including not only that portion which was the *jus civile* in the strictest sense of the term as being based upon early usage and legislation, but also that portion based upon the later principles of the *jus gentium* and the *jus naturale*.

The principal characteristics of the *jus civile* in its narrowest and strictest sense as the early law of Rome were its rigid and elaborate formalism, and its rules and principles based upon a peculiar tribal, clan, and family organisation. It was a system founded upon and adapted to the usages of an agricultural community in an early stage of development, but it was essentially unsuited to the requirements of a rapidly extending commercial community of a cosmopolitan character. For this reason the formalism of the strict *jus civile* gradually gave way to, and was succeeded by, the equitable principles of the

[1] The most comprehensive examination of the speculative *jus naturale* as understood by the Romans is that by Voigt, *Das Jus Naturale*. He summarises its characteristics to the following effect:—(1) It applies to all mankind; (2) among all peoples; (3) in all ages; and (4) it corresponds with man's innate sense of right. Voigt also formulates the propositions of the *jus naturale* thus: (1) recognition of the claims of blood; (2) duty of faithfulness to engagements; (3) apportionment of advantage and disadvantage, gain and loss, according to the standard of equity; (4) supremacy of the intention over the words or form in which the intention is manifested (Muirhead, *Roman Law*, 281, 282). For examples of how these propositions were applied in practice and modified the Roman Law, see Muirhead, *ut supra*, 282.

[2] Justinian, *Inst.* i. 2, 1; Gaius, *Inst.* i. 1.

[3] *Inst.* i. 2, 2.

jus gentium through the medium of the Praetorian Edict,[1] and of juristic interpretation.[2]

The *jus civile*, in the special sense of the law peculiar to Rome, was subdivided into "written" law (*jus scriptum*) and "unwritten" law (*jus non-scriptum*);[3] the former was law embodied in writing at its origin, while the latter was customary law not embodied in written form Upon this simple principle the Praetor's Edict was one of the sources of *jus scriptum*, even when it was based upon and merely gave effect to immemorial usage.[4] The *jus scriptum* or "written law" was derived at different times and in varying degrees from those sources, which have been already considered,[5] in the form of *leges, plebiscita, senatus-consulta, edicta magistratuum, responsa prudentium*, and *principum placita*.[6]

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[1] *Q.v. ante*, p. 24.
[2] *Ante*, p. 35.
[3] Justinian, *Inst.* i. 2, 3.
[4] *Cf.* Moyle, *Institutes of Justinian*, 101, 102, s. 3.
[5] Chapter I., p. 17 *et seq.*
[6] Justinian, *Inst.* i. 2, 3.

PART II

THE LAW RELATING TO PERSONS

Chapter I.—Persons Generally
„ II.—Caput and Status
„ III.—Legal Capacity of Persons
„ IV.—Divisions of Persons
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„ VI.—The Roman Family Organisation
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PART II

THE LAW RELATING TO PERSONS[1]

CHAPTER I

Section 1.—Persons Generally

A "PERSON" (*persona*), in the sense of the Roman Law, was some being having a recognised standing (*status*) in the view of the law and capable of acquiring, possessing, and exercising civil rights and of performing civil duties.[2]

The word *persona* possessed and was employed in two distinct senses: it was used either to connote all beings that are capable of becoming the active or the passive subject of legal rights, or to signify the quality or character in which legal capacity is exercised.[3] Thus the same *persona* in a wider sense might also possess, at the same time, several *personae* or legal characters in the narrower sense, such as that of a husband (*persona mariti*), or of a father (*persona patris*), or of a son (*persona filii*), or of a guardian (*persona tutoris* or *curatoris*), in each of which *personae* or characters he is separately regarded by the law.[4]

The term *persona* was not confined to individual human beings, but, signifying as it did all beings capable of being the subject of legal rights, it is also applied both to aggregates of individual human beings, such as the State, or a corporation, and to aggregates of property existing collectively for the furtherance of particular objects, such as charitable foundations. The Roman Law also gave the character and proprietary rights of a *persona* to even such objects as an inheritance in abeyance, and the public treasury or "Fisc "(*fiscus*). Legal persons are thus either "natural" or "juristic."[5]

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[1] Justinian, *Inst.* i. 3-36.

[2] *Cf.* Cuq, *Institutions Juridiques des Romains*, ii. 68; Girard, *Manuel de Droit Romain*, 87 (5th ed., 91); May, *Éléments de Droit Romain*, 59.

[3] *Cf.* Ortolan, *Roman Law*, 453.

[4] This use of the word *persona* is derived from its original signification of an actor's mask, and it thus came to be applied to the various characters or rôles played by an individual on the metaphorical stage of life.

[5] French, *personnes physiques* or *réelles*, and *personnes juridiques* or *morales*. *Cf.* Cuq, *Institutions Juridiques des Romains*, ii. 68; Girard, *Manuel de Droit Romain*, 228 (5th ed., 235-238); May, *Éléments de Droit Romain*, 59; Didier-Pailhé, *Droit Romain*, i. 6, 7.

A "natural" or "physical" person is an individual human being born in the ordinary course of nature, and invested thereby, from the moment of birth to the instant of death, with personality and proprietary capacity.

A "juristic" person has no physical existence but is entirely an artificial creation and an abstract conception of the law, and signifies an aggregate of either individuals or property regarded by the law as a single entity or person and, as such, invested with a capacity for rights and duties.

The Roman Law did not, indeed, employ any special terminology to indicate the distinction between "natural" and "juristic" persons, which nevertheless was well understood, but in a passage in the *Digest*,[1] taken from Ulpian, the expression *singularis persona* is used to signify a "natural" person in contrast with such collective terms as *populus*, *curia*, and *collegium*.

"Juristic" or "juridical" persons consisted of either aggregates of persons or aggregates of things distinguished by later civilians, though not by the Roman jurists, by the expressions *universitas personarum* and *universitas rerum*.

The conception of a *universitas personarum* amongst the Romans was an aggregate of individual human beings forming a single collective person, and possessing rights and duties quite distinct from those of the single individuals (*singuli*) composing it. A *universitas personarum* was frequently regarded as forming, and was consequently styled, a legal *corpus*; in these expressions we find the derivation of the modern "University" and "Corporation."[2]

A *universitas rerum* was an aggregation of money or of property directed towards the furtherance of particular purposes, such as charity, religion, or education.

The essential element in the Roman conception of a "person" was the capacity for the possession and exercise of legal rights and duties; this capacity was signified by the term *caput*.[3]

Slaves possessed no *caput*,[4] and in that respect were, for the most part, regarded by the law as "things" (*res*), although both Justinian and Gaius, in certain passages, seem to include slaves amongst "persons."[5]

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[1] *Dig.* iv. 2, 9, 1.

[2] Amongst *universitates personarum* constituting corporate bodies, and, as such, accorded collective private rights, may be mentioned the State (*Respublica*), the *populus*, *municipa*, *collegia templorum*, *tenuiorum sodalitia*, *societates publicanorum* or *vectigalium publicorum*, *aurifodinarum*, *argentifodinarum*, *salinarum*, and industrial guilds or corporations such as those of shipowners, ironworkers, bakers, and potters; also the corporations or guilds of subordinate officials such as the *scribae*, *decuriae librariorum*, and *censualium*.

[3] See *post*, p. 71.

[4] Justinian, *Inst.* i. 16, 4; *Dig.* iv. 5, 3, 1.

[5] Justinian, *Inst.* i. 8 pr.; *Dig.* i. 5, 3; i. 6, 1 pr., 1; 50, 17, 22; *Inst.* i. 3 pr.

The true ground of this apparent inconsistency was the recognition by the jurists of the fact that slaves, though possessing no *caput* and therefore failing to satisfy the essential requisite for legal personality, were yet *potential* persons capable of becoming full persons in certain circumstances.[1]

The Roman Law further recognised that the possession of reason, added to the slaves' other human characteristics, of necessity rendered it impossible to apply rigidly the principles of law applicable to unreasoning animals and to inanimate things. Thus the law so far regarded slaves as "persons" as to make them responsible for criminal acts done by them, and they could, moreover, perform certain acts binding upon their masters. In later Imperial times slaves, although not accorded rights or personality, received indirectly a certain amount of protection from the law in the public interest,[2] by the limitation of the masters' absolute rights of ownership over them. The conception of a "juristic" person as the subject of private rights, quite apart from and irrespective of the personality and of the rights and duties of the individuals composing it, was unknown to the earlier Roman Law, and it was only developed during the late Republic with the growth of the system of municipal government, when the *municipia* or town communities were recognised as collective private persons, capable of private rights and duties as a single person;[3] and the conception was, in time, extended to embrace other aggregates of beings formed for various lawful purposes, whether religious, intellectual, commercial, social, or even convivial, as the case might be.

The conception of a "juristic" person was developed to apply to those cases where there existed collective individual interests, and where it would be for the general and permanent interests of society that these collective rights and interests should be continued for an indefinite period rather than cease with the death of the particular individuals at any given time composing the corporate body, as did the rights of individual natural persons.[4] "Juristic" persons were thus not only accorded a collective legal personality and existence entirely distinct and separate from that of the individual "natural" or "physical" persons composing them, but they were also entirely unaffected in their legal character, or as regards their collective rights and duties, by any changes in the identity of the individual natural persons composing them. But

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In this last passage, however, it has been contended, Justinian draws a distinction between "persons" and "men," and while saying that "all 'men' are either free or slaves," it is not necessarily implied that all "men" are "persons" in a legal sense (*cf.* Moyle, *Inst.* 85).

[1] See *post*, Chapter V.

[2] See "Slavery," *post*, Chapter V., p. 105.

[3] Sohm, *Institutes of Roman Law*, s. 20, 102. *Cf.* also May, *Droit Romain*, 60, note 6. See also Reid, *The Municipalities of the Roman Empire* (Cambridge University Press, 1913).

[4] *Cf.* Mackenzie, *Studies in Roman Law*, 70; May, *Éléments de Droit Romain*, 59; Girard, *Manuel de Droit Romain*, 228, note 3 (5th ed., 235).

though in all proprietary respects "juristic" persons are thus put upon an equality with natural persons, yet, as being, in reality, mere abstract creations of the law, they were incapable of the possession of family rights in the true and proper sense; they might possess, however, a sort of family right in the form of the patronage of their enfranchised slaves.[1]

The Roman conception of "juristic" or artificial personality is widely understood and developed in modern legal systems, and is exemplified in municipal corporations, charitable foundations, trusts, universities, companies, clubs, partnerships, and a great variety of both religious and secular organisations and societies.[2]

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[1] *Cf.* Girard, 230 (5th ed., 237); May, 59.

[2] Amongst "juristic" persons civilians distinguish between "corporations" and "foundations," in respect that the former have their personality and rights vested in an abstract total entity and not in the aggregate of individual persons composing that abstraction; whereas "foundations," strictly so called, are juristic persons not visibly embodied in individual natural persons,—such as hospitals, charitable trusts, churches, and such institutions having a beneficent purpose thus personified.

CHAPTER II

Section 2.—Caput and Status

The two terms *caput* and *status* were employed by the Romans with reference to the jural capacity of a person.

Caput signified the sum of a person's legal capacities.[1] *Status* signified, generally, the position or estimation which a person occupied in the eye of the law.[2] The *status* of a person was determined by the degree of *caput* which he possessed, his *status* being the aggregate of his rights.[3] These two terms are thus correlative. The *status* of a slave, for example, was the non-possession of *caput*.[4]

The Roman Law considered the jural capacity of an individual person under three heads (*capita*), having reference respectively to the fact of being free, of being a Roman citizen, and of being a member of a Roman family, and these considerations represented the measure of the individual's legal capacity. In other words, the possession of freedom (*libertas*), of Roman citizenship (*civitas*), and of family rights (*familia*), were the essential elements in the consideration and determination of a person's *status* and *caput*.[5] It was only with reference to these three elements that the Roman Law invested an individual within the Roman State with private rights; to a free man, as such, it accorded only such rights as were based upon the *jus gentium*. "The civis possessed far more rights, even in the field of private law, than the free peregrinus, and many of these he enjoyed, not through being a civis, but because he was a member of a definite Roman family."[6]

This view of jural capacity was peculiar to the Roman Law, and entirely differs from that of modern times, which considers that any person may acquire full private rights in any territory within which he may be domiciled without the necessity of any arbitrary qualifica-

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[1] *Cf.* Muirhead, *Roman Law*, 121; Mackenzie, *Roman Law*, 69.

[2] See Moyle, *Inst.* 155.

[3] *Cf.* Moyle, *Inst.* 86.

[4] See *ante*, p. 68, and "Slavery," *post*, Chapter V.; *Dig.* iv. 5, 3, 1; *Inst.* i. 16, 4.

[5] *Cf.* Muirhead, *Roman Law*, 2nd ed., 121; Girard, *Manuel de Droit Romain*, 87 (5th ed., 91); May, *Éléments de Droit Romain*, 61; Didier-Pailhé, *Cours de Droit Romain*, i. 7; Cuq, *Institutions Juridiques des Romains*, ii. 68.

[6] Moyle, *Institutes of Justinian*, 4th ed., 86.

tions such as the Roman Law regarded as essential elements in the acquisition and determination of legal status and capacity.[1]

SECTION 3.—CAPITIS DEMINUTIO[2]

A person might undergo a loss or a change of *status* or jural capacity; such a loss of *status* was styled *capitis deminutio*, and it was of three degrees, known respectively as "the greatest," *capitis deminutio* (*cap. dem. maxima*), "the less" or "the intermediate" (*cap. dem. minor* or *media*), and "the least" (*cap. dem. minima*).[3]

SECTION 4.—CAPITIS DEMINUTIO MAXIMA

The greatest change of *status* (*capitis deminutio maxima*) was suffered when a free person lost his liberty and became in the position of a slave in any of the circumstances in which slavery might be created.[4]

The loss of liberty (*libertas*) involved the loss of the lesser elements of citizenship and of family.

The loss of liberty through capture in war did not, however, destroy but only suspended the civil rights of a Roman citizen, which revived by the operation of the fiction known as the *jus postliminii*, if the captive recovered by any means[5] his liberty, and returned either to Roman territory or to that of a friendly State.[6]

> The fiction of *postliminium* was introduced by the jurists upon grounds of both equity[7] and convenience,[8] and by it a person was placed, as far as possible, in the position as if he had never lost his liberty, to the effect of entitling him to the enjoyment of all rights that might have accrued to him during his captivity.[9] Loss of liberty by capture thus merely created a period of civil death so long as the captivity continued.
>
> The fiction of *postliminium*, however, did not apply originally to the case

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[1] *Cf.* Moyle, *ut supra.*

[2] See on *cap. deminutio*, Muirhead, *Roman Law*, 2nd ed., 121 *et seq.*, and Appendix, note (*b*), 422 *et seq.*; Moyle, *Inst.* 155-158, and *Excursus*, i. 181; Hunter, *Roman Law*, 214 *et seq.*; Roby, *Roman Private Law*, i. 41, 45; ii. 266; Sohm, *Institutes of Roman Law*, 3rd ed., 178; Girard, *Manuel de Droit Romain*, 186 *et seq.* (5th ed., 192); May, *Éléments de Droit Romain*, 149 *et seq.*; Didier-Pailhé, *Droit Romain*, i. 123-127; Cuq, *Institutions Juridiques des Romain*, i. 200-204.

[3] Justinian, *Inst.* i. 16; Gaius, *Inst.* i. 159.

[4] See "Slavery," *post*, Chapter V.

[5] *Dig.* xlix. 15, 26.

[6] Justinian, *Inst.* i. 12, 5; Gaius, *Inst.* i. 129; *Dig.* xlix. 15, 19, 3.

[7] Cf. *Dig.* xlix. 15, 19 pr.

[8] Cf. *Dig.* l. 16, 3, 1.

[9] Justinian, *Inst.* i. 12, 5; *Dig.* xlix. 15, 21, 6.

of a free-born citizen dying in captivity, in which circumstances he would die as a slave. The inconvenient effects of such a theory upon the law of the family and of succession[1] necessitated a modification of the rule, and in B.C. 81 the *Lex Cornelia* extended the fiction of *postliminium*, by providing that a free-born citizen dying in captivity should be held to have died at the moment of capture, and not at the instant of death, thus putting him in the position of having died free. Thus the return of a captive ascendant revived, *ipso facto*, his *potestas*;[2] or his death in captivity rendered *sui juris* those persons who were formerly under his *potestas*, as from the moment of capture;[2] and a will made prior to captivity was effective either on return by the *jus postliminii* or on the death of the testator in captivity in terms of the *Lex Cornelia*.[3]

In order that the fiction of *postliminium* might apply, the capture required to have been on the part of another State, though not necessarily during a state of war;[4] it required, moreover, to have been an actual capture, and not one due to either surrender[5] or desertion.[6] Further, the person recovering his liberty must have recovered it with no intention of either remaining with[7] or of returning to the enemy,[8] as the case might be.

The fact that, in order that the fiction of *postliminium* should apply, the capture required to be on the part of some other State excluded from the application of the fiction the cases of capture by brigands, or by pirates, or by parties during a civil war, which circumstances did not in any way affect a person's *status*,[9] and he continued to be regarded by the law as free.[10]

Postliminium applied to both persons and things, and it signified, generally, the recovery of rights by a person returned from captivity, or the recovery of rights over a person or thing recovered from possession of a hostile State.[11] The former is an active and the latter a

[1] Cf. *Dig.* l. 16, 3, 1. The children of slaves could not inherit.

[2] Justinian, *Inst.* i. 12, 5.

[3] Justinian, *Inst.* ii. 12, 5.

[4] *Dig.* xlix. 15, 12 pr.

[5] *Dig.* xlix. 15, 17.

[6] *Dig.* xlix. 15, 19, 4.

[7] *Dig.* xlix. 15, 20.

[8] *Dig.* xlix. 15, 26. In this connection there may be cited the well-known historical instance of M. Regulus, who was captured by the Carthaginians in B.C. 255, and was in B.C. 250 sent by them to Rome to endeavour to obtain favourable terms of peace, upon an express promise given by him to return to Carthage if he should be unsuccessful. His intention to return was considered to exclude him from the application of the *jus postliminii*, and his *status* as a captive was consequently not affected by his return to Rome (*Dig.* xlix. 15, 5, 3). The same principle was applied in the case of the captives sent to Rome by Hannibal, after the battle of Cannae, in order to negotiate (Gell. vi. 18).

[9] *Dig.* xlix. 15, 24; xlix. 15, 19, 2.

[10] *Dig.* xlix. 15, 21, 1.

[11] Poste, *Institutes of Gaius*, 4th ed., 80.

passive signification, connoted by modern civilians by the expressions *postliminium activum* and *passivum* respectively.

The necessity for the fiction of *postliminium* arose from the fact that Roman Law, in common with ancient law generally, regarded capture in war as a good title to both the person and the property of the captive.[1] The benefit of the *jus postliminii* did not extend to persons sold into slavery by their fathers, or by the Roman people.

Justinian, following Scaevola, derives the term *postliminium* from *post* and *limen*,[2] and, as such, signifying the crossing of a threshold or boundary. Poste, however, considers the word *postliminium* as derived from "pot," the root of *potestas* or *possessio*, and *limen* or *stlimen*, equivalent to *ligamen*, and denoting, consequently, "the bridging over of the interval of captivity by a fiction of continued capacity or possession, as a doorway is bridged over by a lintel (*limen*)."[3]

SECTION 5.—CAPITIS DEMINUTIO MEDIA OR MINOR

The "lesser" loss of status, or that one "intermediate" (*media*) between "the greatest" (*maxima*) and "the least" (*minima*), was suffered when a Roman citizen, while retaining his freedom, lost his rights of citizenship.[4] The loss of citizenship involved the loss of family rights, since these could only be enjoyed by citizens.

Capitis deminutio media involved the loss of both the public and the private rights of citizenship, the former consisting of the *jus suffragii* or the right of voting, and of the *jus honorum* or the right of holding public offices, while the latter comprised the *jus commercii*, or the right of acquiring and owning property and of making contracts in the forms of the *jus civile*, competent only to Roman citizens, and the *jus connubii*, or the right to contract regular marriage, according to the forms peculiar to the *jus civile*.[5]

Capitis deminutio media (or *minor*) took place when a citizen became a Latin colonist,[6] or was outlawed,[7] or was deported as a punishment for crime,[8] or deserted to the enemy.[9]

Outlawry was effected by a citizen being denied the necessaries of life through the "interdiction of fire and water" (*aquae et ignis interdictio*). This procedure was necessitated by reason of the maxim of the

[1] Hunter, *Roman Law*, 216.
[2] Justinian, *Inst.* i. 12, 5.
[3] Poste, *Institutes of Gaius*, 4th ed., 80.
[4] Justinian, *Inst.* i. 16, 2; Gaius, *Inst.* i. 161.
[5] See p. 96.
[6] Gaius, *Inst.* i. 131.
[7] Justinian, *Inst.* i. 16, 2; Gaius, *Inst.* i. 161.
[8] Justinian, *Inst.* i. 12, 1; Gaius, *Inst.* i. 128.
[9] *Dig.* iv. 5, 5, 1.

Roman Law that no one could cease to be a citizen against his will, and he was therefore placed in such a position as to be compelled to withdraw from Rome in order to live. Interdiction of fire and water was a form of perpetual banishment which, however, did not, in the time of Justinian, although it had done so previously, in common with simple banishment[1] (*relegatio*), involve loss of liberty. It was superseded, in the time of Augustus, by deportation to an island (*deportatio insulae*) by which a person, while retaining his personal liberty, was confined within strictly defined limits under penalty of death if he transgressed them; it was in effect banishment for life.[2]

The effect of "deportation," as had been that of "interdiction of fire and water," was to create a state of civil death,[3] which terminated all family and private rights under the Roman Law, and placed the deported person in the position of a peregrin (*peregrinus*).[4] A "deported" person might, however, in certain circumstances, be pardoned and permitted to return; in such a case his rights as a citizen revived, and he was, as far as possible, restored to the position in which he had formerly stood, as if he had never been deported: he was then said to have been *restitutus in integrum*.[5]

Deportation must not be confounded with that form of simple banishment or exile (*exilium*) known as "relegation" (*relegatio*), which did not involve either any loss of status or forfeiture of property.[6] A person who was "relegated" (*relegatus*) or exiled was prohibited, either during life or for a limited period, from entering any particular district, or was restricted in his movements to the limits of either an island or of some particular region,[7] but he retained his *potestas* over his children, or remained under the power (*potestas*) of his *paterfamilias* as the case might be.[8]

Section 6.—Capitis Deminutio Minima

The "least" change of status (*capitis deminutio minima*) was suffered when a Roman citizen ceased to be a member of a particular agnatic family, but retained both his citizenship and his liberty.[9] *Capitis deminutio minima* might arise in any of three sets of circumstances, namely, (1) when a person *sui juris* became *alieni juris*, as when a *paterfamilias* gave himself in arrogation[10] and thereby passed under the

[1] *Dig.* l. 13, 5, 3.

[2] *Dig.* xlviii. 29, 2; xlviii, 22, 18, 1; xlviii., 22, 15, pr.

[3] *Dig.* xxxvii. 4, 10, 8.

[4] Ulpian, *Reg.* 10, 3.

[5] *Code*, ix. 51, 1; Justinian, *Inst.* i. 12, 1; Gaius, *Inst.* i. 128.

[6] *Dig.* xlviii. 22, 4; xlviii. 22, 18; *Inst.* i. 12, 2.

[7] *Dig.* xlviii. 22, 7; xlviii. 22, 5.

[8] Justinian, *Inst.* i. 12, 2; *Dig.* xlviii. 22, 4.

[9] Justinian, *Inst.* i. 16, 3; Gaius, *Inst.* i. 162. *Cf.* Moyle, *Inst.* 156, s. 3. "The essence of *capitis deminutio minima* is the leaving, by the *minutus*, of his previous agnatic family."

[10] See "Adoption," *post*.

potestas or authority of his adoptive parent; or when a person was legitimated,[1] or when a woman who was *sui juris* came into the *manus* of her husband by "confarreation" or by "coemption."[2] (2) When a person *alieni juris* became *sui juris*, as when a child was emancipated from the *patria potestas*, or when a wife *in manu*[3] of her husband was re-mancipated and thus freed from his authority. Although in both of these cases the change there operated was one from a state of dependence to a state of independence, such persons were considered to have undergone *capitis deminutio;* but no *capitis deminutio* was considered to have been suffered when children became *sui juris* on the death of the *paterfamilias*, or when a *filiusfamilias* was consecrated as a priest (*flamen*), or when a *filiafamilias* was consecrated as a vestal virgin. The ground of this distinction was that in the first case the change consisted in the disappearance of the family head but not in the loss of the family, and in the two last cases the persons passed from a human to a divine family by the fact of consecration.[4]

Capitis deminutio minima might also arise (3) when a person already *alieni juris* passed from the authority (*jus*) of one person into that of another, as by adoption, or by emancipation.

There has been much discussion as to whether *capitis deminutio minima* necessarily involved a descent, or merely signified a change in the family scale. It is possible to reconcile the conflicting views by assuming that the material and determining factor was not whether any change of family position had taken place but whether there had been an actual change of family; and this is consistent with the alternative description of *capitis deminutio minima* as *mutatio familiae* or a change of family.

In this view a person becoming *sui juris* from being *alieni juris* underwent *capitis deminutio* in so far as his former personality or character was thereby extinguished, and it would be the same in the case of a person already *alieni juris* passing into the authority (*jus*) of another person, as in the case of adoption, or of children of a person arrogated. It would thus be immaterial, and a *capitis deminutio* would be operated, whether the change was actually to the benefit or to the deteriment of the person's position.[5]

SECTION 7.—EFFECTS OF CAPITIS DEMINUTIO

The general effects of *capitis deminutio minima* were to extinguish *potestas*, and to sever the agnatic tie between the person *capite minutus*

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[1] See "Legitimation," *post.*

[2] See "Marriage," *post.*

[3] *Re Manus*, see *post*, *voce* "Marriage."

[4] *Cf.* Muirhead, *Roman Law*, 123; Moyle, *Inst.* 157.

[5] See upon the controversy regarding *cap. dem. minima*, Poste, *Institutes of Gaius*, 4th ed., 98; Moyle, *Institutes of Justinian*, 181-184; Muirhead, *Roman Law*, 123, 124; Hunter, *Roman Law*, 219, 220.

and all those persons previously related to him as agnates,[1] and to deprive the person undergoing it of all rights previously possessed by him as a member of the family left. Thus a person *sui juris* on becoming *alieni juris* lost all rights of property and of testation, and acquired instead only such rights as were competent to a *filiusfamilias;* and a person *alieni juris* on passing under the authority (*jus*) of another person lost all right previously possessed by him as a *suus haeres* in his former family, and could not, therefore, succeed on intestacy or demand to be instituted heir, or to be disinherited by name.

Capitis deminutio in any form, extinguished civil debts[2] on the ground that a person *capite minutus* was civilly dead as regards his former *persona* or character, and, moreover, without leaving any heir against whom an action under the *jus civile* could be directed. Such persons, however, notwithstanding their *capitis deminutio,* continued to be naturally bound, and an equitable praetorian action was provided for the enforcement of the rights of creditors in such cases. Liability for delictual acts, however, was not extinguished by *capitis deminutio.*

Under the older law any form of *capitis deminutio* extinguished the personal servitudes of "usufruct" and of "use" (*usus*),[3] but according to the Justinianian law only *capitis deminutio maxima* and *media* had that effect. *Capitis deminutio* invalidated a will by reason of the rule of law that the testamentary capacity of a person must continue from the time of making the will to the moment of death;[4] and it was also regarded as terminating an existing partnership,[5] on the ground that the person *minutus* was civilly dead:[6] a person who was *minutus* became by the fact of *minutio* an entirely new *persona.*

SECTION 8.—EXISTIMATIONIS MINUTIO—INFAMIA[7]

A Roman citizen was regarded as possessing, in virtue of his citizenship (*civitas*), a certain degree of dignity, or public esteem, which was known as "existimation" (*existimatio*). A citizen's "existimation" was

[1] Cognation, however, was only destroyed by *cap. dem. maxima* and *media. Cf.* Justinian, *Inst.* i. 16, 6.

[2] Gaius, iii. 84; iv. 38.

[3] But the lesser personal servitudes of "habitation" (*habitatio*) and "services of slaves or of animals" (*operæ servorum vel animalium*) were not distinguished by *cap. dem. minima,* even prior to the time of Justinian (see "Personal Servitudes," *post,* Part III.).

[4] *Cf.* Muirhead, *Roman Law,* p. 125.

[5] See "Partnership," *post,* Part IV.

[6] Gaius, *Inst.* iii. 153.

[7] See Greenidge, *Infamia in Roman Law*; Moyle, *Inst.* 157, 158, 613, 614; Muirhead, *Roman Law,* 424; Poste, *Institutes of Gaius,* 4th ed., i. 161; Hunter, *Roman Law,* 1038-40, 1043; Sohm, *Institutes of Roman Law,* 3rd ed., 182.

his personal honour or good reputation (*bona fama*), and it was liable to be either entirely or only partially lost.[1]

Existimatio was entirely lost or "consumed" if citizenship (*civitas*), upon the fact and possession of which it was based, was lost by either *capitis deminutio maxima* or *media*;[2] while it might be "diminished," to a greater or less degree, without being actually destroyed or consumed, if a citizen was guilty of dishonourable personal conduct sufficient, in the view of the law, to justify a loss or limitation of civil rights. In the latter case a person incurred *infamia*, or "infamy," which involved a lessening of his *existimatio*, or a loss of public esteem as a citizen.

Infamia, however, though involving disgrace and moral censure which carried with them legal punishment in the form of loss of civil rights, did not necessarily involve *capitis deminutio*, although it was analogous to it; nor, conversely, did *capitis deminutio* necessarily involve *infamia*.

The generic term for *minutio existimationis* was *ignominia*, or "ignominy"; and this was incurred when a citizen, by his personal conduct, put himself into a position defined in the Praetorian Edict as involving "infamy."[4]

The oldest form of *minutio existimationis* is traceable to an enactment, supposed to have been included in the Twelve Tables, by which citizens guilty of certain crimes were declared *improbi* and *intestabiles*; and a citizen's civic reputation was also affected, in earlier Roman times, by *subscriptio* or *nota censoria*, which was the setting of a mark against the name of a citizen by the Censor, when making out his official lists of classes and divisions, on account of dishonesty or profligacy; and such "*subscriptio*" had the effect of excluding persons from the public service, and from the exercise of certain public rights.

The most frequent cause of *minutio existimationis*, however, was *infamia*, which, though known to the earlier law, was developed, and assumed a definite form, in the Praetorian Edict as an instrument of morality and justice, and the Edict defined the circumstances in which "infamy" would be incurred and the disabilities and penalties that would attach to it.[5]

Infamia resulted from condemnation in a *judicium publicum* or public trial,[6] and it was also involved by condemnation in various civil

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[1] *Dig.* l. 13, 5, 1, 2.

[2] *Dig.* l. 13, 5, 3.

[3] Justinian, *Inst.* i. 16, 5; *Dig.* i. 9, 3 See also Greenidge, *Infamia*, 5 *et seq.*; Poste, *Institutes of Gaius*, 4th ed., 96.

[4] *Dig.* iii. 2, 1. *Cf.* Moyle, *Inst.* 614; also on term *ignominia*, *cf.* Roby, *Roman Private Law*, ii. 327, note 1.

[5] Moyle, *Inst.* 158; Poste, *Gaius*, *ut supra*.

[6] A "public trial" was one under a particular statute, such as the *Lex Cornelia* on assassins and poisoners; *Lex Pompeia* on parricides; the *Leges Juliae* on treason, adultery, peculation, private or public violence, canvassing, extortion; and the *Lex Fabia* on kidnapping. See Roby, *Roman Private Law*, ii. 328, note 4.

actions based upon allegations or implications of fraud or dishonourable conduct, such as actions on account of fraud, theft, robbery, or *injuria*; and in the actions *tutelae*, *mandati*, *depositi*, and *pro socio*.

Persons branded with "infamy" thus included fraudulent tutors, curators, partners, depositaries, mandataries, sellers, and bankrupts; also persons discharged from the army with ignominy, persons guilty of fraud or of usury, persons condemned for taking advantage of minors, guardians marrying their female wards when under age, persons false to their oath, and persons exercising what were regarded as dishonourable callings, such as those of a player or of a procurer.[1]

Minutio existimationis in the form of *infamia* involved serious legal disabilities, both political and civil, and consequent loss of legal capacity. Prior to the time of Justinian an infamous person (*infamis*) lost both the *jus suffragii* and *jus honorum*;[2] his *jus connubii* or matrimonial rights were restricted by the operation of the *Lex Julia de maritandis ordinibus* (4 A.D.);[3] he lost the right to apply to the Court for legal protection (*jus postulandi*); and he could neither litigate on behalf of others, nor appoint a procurator on his own behalf.

In the time of Justinian the special disqualifications attaching to *infamia* either no longer existed or were expressly abolished, and the legal result of *infamia* by that time was merely that a judge might, in his discretion, attach disabilities to the infamous person; thus he might refuse to admit him as a witness, or to appoint him as a guardian, or to permit him to take as heir (*haeres*) under a will.[4]

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[1] Cf. *Dig.* iii. 2, 1. The list of *infames* here given in the *Digest* is not exhaustive. Roby gives a very complete list, taken from that given in the *Lex Julia municipalis*, 110-123, of those disqualified for the municipal council. See Roby, *Roman Private Law*, ii. 327-329, and 327, note 2.

[2] See *ante*, p. 74, and *post*, p. 96.

[3] This statute was afterwards supplemented by the *Lex Papia Poppaea* (9 A.D.) and the combined statutes were known as the *Lex Julia et Papia Poppaea*. The disabilities attaching to an "infamous" person under this statute were removed by Justinian.

[4] By granting to the relatives of the testator the *querela inofficiosi testamenti*. See on "inofficious testaments," Justinian, *Inst.* ii. 18; *Dig.* v. 2.

CHAPTER III

Section 9.—Legal Capacity of Persons

The terms *status* and *caput* were used by the Romans, as we have already seen, to signify the capacity of a legal person (*persona*) to enjoy and exercise legal rights, and to incur legal obligations, both public and private.[1]

The legal capacity of different persons differed in degree, and might be qualified or limited, either wholly or partially, by such general circumstances as those of sex,[2] birth,[3] age,[4] or mental condition,[5] and also by reason of certain special circumstances, which will be mentioned further on,[6] and which limited, for the most part, temporarily and partially, the legal capacity of persons otherwise possessing full legal status.

Stated in another way, legal incapacity was based upon three general grounds: (1) It might be due to actual mental weakness or its equivalent, as in the case of insane persons and infants, in which case it was total or absolute; (2) it might exist by reason of defective status created by the circumstances of sex, birth, or age, in which case it was only partial; or (3) it might be occasioned by certain special circumstances, such as, *e.g.*, the holding of some particular office which gave rise to certain disabilities, usually of a partial and temporary nature.

Section 10.—Limitation of Legal Capacity by Sex

The legal capacity of women was restricted by the Roman Law on account of their sex and its presumed weakness of disposition.[7] Women could not fill public offices (*publica munera*) or act as magistrates, judges, advocates, or procurators;[8] but women might always competently plead their own causes although they could not act on behalf of others,[9] and

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[1] See *ante*, Chapter II., p. 71.
[2] See *infra*, Section 10.
[3] See *post*, p. 83.
[4] See *post*, p. 85.
[5] See *post*, p. 88.
[6] See *post*, pp. 90-95.
[7] *Cf.* Gaius, *Inst.* i. 190.
[8] *Dig.* l. 17, 2, pr.; *Code*, ii. 13, 18; ii. 13, 4; Paul, *Sent.* i. 2, 1.
[9] *Cf.* Mackenzie, *Roman Law*, 448 and 462, Appendix.

in certain circumstances daughters might act for their parents if these were aged or ill and no one could be got to act for them.[1]

Women were for long under a form of perpetual tutelage, and so long as the agnatic tutelage of women existed as a recognised Roman institution they were incapable of performing certain legal acts without the sanction (*auctoritas*) of their agnatic guardians. Thus, without such authority, they could not be parties to any legal transaction governed by the strict *jus civile*, nor could they bind themselves by contract, nor alienate *res mancipi*[2] belonging to them, but they might competently dispose of *res nec mancipi* in any way they pleased,[3] and bind themselves by transactions *jure gentium* without the authority of their agnatic tutors. The agnatic tutelage of women had as its object the protection of the interests of their heirs who were their agnates, and not the protection of the interests of the women themselves.

The rules of agnatic tutelage of women of full age[4] (*legitima tutela agnatorum*) were originally, and for long, very strictly applied and construed, but they came in time to be gradually relaxed, and by the time of Gaius the institution had ceased to be of importance. By that time, indeed, in those cases where the tutor's sanction was still requisite, it was purely formal, and could be demanded, except in certain exceptional circumstances, as where the tutelage (*tutela*) was that of a patron or of a *parens manumissor*, and the woman desired to alienate her *res mancipi*, or to incur an obligation, or to make a will.

The *Lex Julia et Papia Poppæa* (9 A.D.) freed from perpetual tutelage (*perpetua tutela*) those women who had acquired the special privilege known as the *jus liberorum* or "the right of children," in respect of which a woman of free birth (*ingenua*) having three lawful children and a freed woman (*libertina*) having four lawful children was entitled to exemption.[5]

Agnatic tutelage of women, except as regards ascendants and patrons, was abolished by the *Lex Claudia*[6] in 47 A.D., but it yet continued to exist to some effect until the time of Diocletian.[7] It had, however, entirely disappeared by the time of Justinian,[8] and there is no trace or mention of it in either the Theodosian Code or the Justinianian books.[9]

[1] *Dig.* iii. 3, 41.

[2] See *post*, Part III.

[3] See *ibid.*

[4] But vestal virgins were always exempted (Gaius, i. 145).

[5] Gaius, *Inst.* i. 145 ; i. 194.

[6] Gaius, *Inst.* i. 157 ; i. 171.

[7] *Cf.* Girard, *Manuel de Droit Romain*, 216 (5th ed., 223).

[8] Poste's *Gaius*, iii. 170.

[9] On tutelage of women see Gaius, *Inst.* i. 145, 150-154, 157, 168-175, 190, 194, 195 ; ii. 47, 80-85, 122 ; iii. 91, 108, 171. Also see Girard, *Droit Romain*, 214 *et seq.* (5th ed., 221-223) ; May, *Droit Romain*, 140 *et seq.* ; Didier-Pailhé, *Droit Romain*, i. 109 *et seq.*; Poste's *Gaius*, 110 *et seq.*

Amongst other disabilities women were for long incapable of acting as tutors to their children, but the Justinianian law permitted a mother or grandmother to act as tutor to her pupil children or grandchildren, so long as she did not re-marry, if no testamentary tutor had been nominated.[1] But this right did not extend to curatory, and the guardianship of the mother or grandmother consequently ended, *ipso facto*, upon the pupil attaining minority.

Until the time of Diocletian and Maximian (291 A.D.) women, although they could always be adopted, could not lawfully adopt because they could not possess *patria potestas;* the right to adopt, however, was conceded to women as a special favour — *ex indulgentia principis*—and as a solace for the loss of their own children.[2] But the right to adopt so conceded was only a qualified one, for it did not carry with it the acquisition of *potestas*, but only such rights as the woman would have had if the person adopted had been her legitimate child,[3] and the adopted child, although acquiring certain legal rights of succession to the adoptive mother, was not placed in the position of a "legitimate" (*legitimus*) child, but only in that of a "natural" one.[4]

Women were, further, unable to give themselves in arrogation until the reign of Diocletian, when it was rendered legally possible by the substitution of an Imperial rescript for the resolution of the *Comitia Curiata*, in presence of which all proceedings in adoption had previously taken place, and to which assembly women had not the right of access.[5]

By the *Lex Voconia* women could not competently be instituted heirs to a testator registered in the census roll as possessing upwards of 100,000 asses, and they could not take as legatees more than half the testator's estate.[6]

Female agnates were also, until the time of Justinian, under certain disabilities in regard to intestate succession.[7] The *Senatus-Consultum Velleianum*, passed in the reign of the Emperor Claudius, about 46 A.D., prohibited women from becoming sureties, or, in any form, undertaking liabilities on behalf of other persons.

As if to counterbalance all these sex disabilities, women enjoyed

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[1] *Code*, v. 35, 2; *Nov.* 118, ch. 5. See also *Nov.* 22, ch. 40; 89, ch. 14; 94, 155.

[2] Justinian, *Inst.* i. 11, 10. *Cf.* Gaius, *Inst.* i. 104.

[3] *Code*, viii. 48, 5.

[4] The term "natural" is here used in the sense peculiar to the Roman Law of a child born in the recognised relationship of concubinage, and did not signify a bastard, for which the special term *spurius* was employed.

[5] *Dig.* i. 7, 21; Ulpian, *Frag.* viii. 5.

[6] The supposed date of the *Lex Voconia* is 169 B.C. According to Theophilus, it was a *plebiscitum* carried by Q. Voconius Saxa, Tribune of the Plebs, at the instance of the elder Cato.

[7] See Hunter, *Roman Law*, 858, 859.

certain privileges in respect of which the ordinary rules of the law were relaxed in their favour. Thus women, in common with minors, soldiers, and rustics (*rustici*), who were presumably uneducated, might competently plead an error of law as well as an error of fact in order to escape the legal consequences of their acts or omissions;[1] but this privilege was partially abrogated, in 472 A.D., by a constitution of the Emperor Leo.[2] The punishments inflicted upon women were, moreover, sometimes less severe than those to which men were subjected.[3]

SECTION 11.—LIMITATION OF LEGAL CAPACITY BY BIRTH
WHAT CONSTITUTES BIRTH

In order that a child should be invested with personality and acquire the position of a legal "person," the Roman Law required that a child should have been born alive; in other words, live birth was a pre-requisite. This requisite involved, on the part of the child, complete separation from the body of the mother, followed by breathing. Any indication of life was sufficient to satisfy this requirement, and by the Justinianian law, giving effect to the view of the Sabinian school of jurists,[4] no special sign of life, such as that of the child having been heard to cry, was requisite in order to invest the child with legal personality;[5] for which purpose, moreover, even a moment of life sufficed.

Until the live birth of a child had been fully established no one could derive any benefit through the child, but an unborn child *in utero* had its patrimonial interests protected by the law as if it were already born;[6] so the share of an unborn child in the succession of its deceased father was reserved pending its birth.

SECTION 12.—LAWFUL AND UNLAWFUL BIRTH

A child might be born either lawfully or unlawfully, and its legal capacity varied accordingly. A lawful or "legitimate" child was one born as the offspring of a man and a woman united in marriage according to the forms required by the law, whereas an unlawful or "illegitimate" child was one born of a man and a woman not lawfully married.

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[1] Cf. *Dig.* xxii. 6, 9 pr.
[2] *Code*, i. 18, 13; Poste, *Gaius*, 111.
[3] *Nov.* 134, ch. 9; Mackenzie, *Roman Law*, 72.
[4] See *ante*, p. 34, note 3.
[5] *Code*, vi. 29, 3.
[6] *Dig.* i. 5, 7.

According to the Roman Law illegitimate children fell within either of two categories, according as they were the issue of concubinage[1] or of promiscuous intercourse. Concubinage was the more or less permanent union of a man and a woman, although not united in marriage; it was a recognised Roman legal institution, and the children of such a union were regarded more favourably by the law than were the offspring of parents between whom there was no relation either of lawful marriage or of concubinage. The offspring of concubinage were known in Roman Law as "natural" children, whereas the children of parents who were not related to each other by either lawful marriage or concubinage were known as "spurious" children,[2] or bastards.

In modern legal systems that do not recognise concubinage there is no such distinction between "natural" and "spurious" children, both falling within the category of bastard or illegitimate children.

Lawful or legitimate children born in civil wedlock took their *status*, according to the Roman Law, from that of their father at the time of conception,[3] whereas the *status* of illegitimate children, whether "natural" or "spurious," was determined by that of the mother at the time of birth.[4] The Roman Law did not recognise any legal relationship as existing between illegitimate children and their father, or any reciprocal rights and duties as existing between them. The illegitimate child was *sui juris* or independent of paternal authority (*patria potestas*), because such authority, as a part of Roman family law, only resulted from lawful marriage in a sense peculiar to the Roman system, and known as *justae nuptiae* or "regular" marriage.[5] Illegitimate children were, however, recognised as relations of their mother, between whom subsisted certain reciprocal rights and duties.

In the time of Gaius the rule fixing the status of an illegitimate child by that of the mother at the time of birth was modified to the effect that the child of a slave woman who had been free at any time between the time of conception and the time of birth was to be regarded as born free.[6]

Section 13.—Legal Capacity of Persons Born of Parents of Unequal Status

The rules for determining the legal status of the offspring of parents of unequal status were, stated generally, that children born in lawful

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[1] See *post.*

[2] *Spurii, vulgo quaesiti* (cf. *Dig.* i. 5, 23). Sometimes the term "natural" is in the Roman Law applied in a special sense to children born of a lawful marriage, in contradistinction to those that have been adopted.

[3] *Cf.* Gaius, i. 88, 89, 94; *Dig.* i. 5, 24; i. 5, 19.

[4] On this question of "Status" see further, p. 85.

[5] See "Marriage," *post.*

[6] Justinian, *Inst.* i. 4, pr.; Gaius, *Inst.* i. 89, 90; Paul, ii. 24, 2; *Dig.* i. 5, 5.

marriage took the status of the father at the time of conception, while a child born out of lawful wedlock followed the status of the mother at the time of birth.[1]

Lawful marriage in the view of the Roman Law might be either (*a*) civil or "regular" marriage, according to the forms peculiar to the *jus civile*, or (*b*) a marriage according to the forms of the *jus gentium*. In the case of "civil" marriage the children followed the status of the father, but in "gentile" or *jus gentium* marriage the legal condition of the children was fixed according to the terms of the *Lex Minicia*,[2] by that of the parent of lower status:[3] thus the children of a peregrin (*peregrinus*) and a Roman mother (*civis Romana*) were regarded as peregrins; so also were the children of a Roman citizen (*civis Romanus*) and a peregrin mother (*peregrina*). If, however, a peregrin possessed the right of marriage according to the forms of the *jus civile*—i.e. *jus connubii*—the ordinary rule of the *jus civile* to the effect that children follow the status of their father would in such cases apply; and thus the offspring of a citizen father and a privileged peregrin mother would be citizens, whilst the children of a female Roman citizen and a privileged peregrin father would be aliens.[4]

SECTION 14.—LIMITATION OF LEGAL CAPACITY BY AGE

The Roman Law fixed the limit of legal incapacity by reason of age alone at twenty-five years complete; above that age the person was a major and below that age a minor. The age of majority was known as *perfecta aetas*, and when a person attained that age he was regarded by the law as fully capable of acting in all matters on his own behalf without the necessity for the intervention of the authority of either a tutor or a curator.

The period of minority was subdivided according as persons had or had not attained puberty, which was in the case of males fourteen and in the case of females twelve years. Males and females below these respective ages were called pupils. All children, male and female, below seven years of age were called infants.[5]

(a) *Capacity of Pupils*

A PUPIL was absolutely incapable of entering into the contract of marriage, or of making a will, and, generally, was legally incapable of

[1] *Cf.* Gaius, *Inst.* i. 76-92. See Poste's *Gaius*, 59.
[2] Date uncertain, but before 90 B.C.
[3] Cf. *Dig.* i. 5, 24; Poste, *Gaius*, 56, 57, 59.
[4] See Gaius, *Inst.* i. 56, 76, 77.
[5] *Code*, vi. 30, 18 pr.

contracting obligations, or of alienating property, without the approval (*auctoritas*) of a tutor, unless the transaction was wholly beneficial to the pupil. The rule was that a pupil could make his position better but not worse without the authorisation of his tutor.[1] In other words, a pupil could acquire rights and bind other persons to himself, but could not incur liabilities without the sanction of his tutor.[2]

> Thus a pupil could not, by himself, grant a valid discharge of a debt, and he could not, without tutorial sanction, pay a debt to the effect of making his creditor owner of the money, nor could money lent to a pupil under a *mutuum*, without the approval of his tutor, be legally recovered. But although payment of a debt to a pupil without the intervention of his tutor did not discharge the obligation, and the tutor might thereafter competently sue for the debt, he might yet be met on the part of the debtor by the plea of fraud; the debt, moreover, would be extinguished so far as the money paid was still in the pupil's possession.

In all cases of reciprocal obligation, as in the contracts of buying, selling, letting, hiring, mandate, or deposit, the person contracting with the pupil was bound by the contract, but the pupil himself was not bound unless his tutor had sanctioned the transaction.[3] In equity however, the Praetor did not permit a pupil at once to enjoy the benefit of a contract and at the same time be himself free from obligation.[4]

A pupil child under *potestas* could not bind himself even with his father's consent.[5] Obligations contracted by a pupil without the sanction of his tutor, although not legally valid and enforceable, were, nevertheless, "natural" obligations, and, as such, could be pleaded by way of exception or defence.[6]

The legal incapacity of INFANTS, below seven years of age, to perform any acts, with or without the consent of a tutor, was absolute, because, in respect of their lack of understanding (*intellectus*), and of judgment (*judicium*), they were regarded as in much the same position as insane persons.[7]

(b) *Capacity of Minors*

A MINOR or person above the age of puberty but under that of majority who had not a curator possessed full legal capacity, and

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[1] Justinian, *Inst.* i. 21 pr.; *Dig.* xix. 1, 13, 29.

[2] Justinian, *Inst.* iii. 19, 9; Gaius, *Inst.* iii. 107-109; *Dig.* xxvi. 8, 9 pr.; *Code*, viii. 39, 1.

[3] Justinian, *Inst.* i. 21 pr.

[4] *Dig.* xliv. 1, 4.

[5] Justinian, *Inst.* iii. 19, 10.

[6] *Dig.* xlvi. 3, 95, 4; xlvi. 2, 1, 1; xxxv. 2, 21 pr.; iii. 5, 3, 4. See also Hunter, *Roman Law*, 607.

[7] Justinian, *Inst.* iii. 19, 10; Gaius, *Inst.* iii. 109; *Dig.* xlv. 1, 141, 2. See *post*, p. 89.

might dispose of his property and make binding contracts, even to the extent of becoming a surety for another person;[1] but a special right of rescission was extended to a minor by the Praetor, not as a right but as a privilege,[2] if he could prove that the transaction was seriously prejudicial to him,[3] and that it had been entered into by him by reason either of undue advantage having been taken of his youth by the creditor, or merely through youthful inexperience and consequent imprudence alone, in consequence of which he had either lost something which he possessed or had missed the opportunity of making some gain which he might have made, or had placed himself under an obligation which he might have declined to undertake.[4] This right of rescission was known as *restitutio in integrum*, and in respect of it a minor, on application to the Praetor, and on proof of "lesion" (*laesio*) or injury to his material interests, might be "restored" against the injurious transaction and be put into such a position as if he had never incurred the obligation.

But this right of restitution competent to a minor was not absolute; the transaction sought to be rescinded required to be one that could be shown to have caused serious injury (*laesio*), and not merely trifling loss or inconvenience.[5] The injury was estimated as at the date of the transaction and not that when it was impugned; and, moreover, the loss occasioned to the minor required to be one arising from the inherent character of the transaction and not from accident.[6]

Further, a minor was not entitled to plead "lesion" or injury and to claim "restitution" (*restitutio in integrum*) if he had himself been fraudulent in the course of the transaction, but he was, in such circumstances, held bound by what he had done, and was thus punished for his fraud.[7]

The transaction also required to be challenged within a certain period after attaining majority, or the right to call it in question was lost. A person had a period of four years available to him after attaining majority within which to claim "restitution" against injurious transactions incurred by him during minority; this period was known as the *quadriennium utile*. The period within which application required to be made to the Praetor was originally one year, and was known as the *annus utilis*, but it was extended by Justinian to four years under

[1] *Dig.* iv. 4, 7, 3.
[2] *Cf.* Girard, *Manuel*, 224 (5th ed., 231).
[3] *Dig.* iv. 4, 6; iv. 4, 7, 1; iv. 4, 49.
[4] *Dig.* iv. 4, 44 (Munro's *Dig.* 250).
[5] Cf. *Dig.* iv. 4, 49.
[6] *Dig.* iv. 4, 11, ss. 4, 5.
[7] *Dig.* iv. 4, 9, 2.

the name of *quadriennium continuum* or *utile*.[1] A person might at any time within that period of four years, if he were *sui juris* or independent, and not subject to the *potestas* or family authority of another person, either challenge or homologate an injurious transaction; but if he ratified such a transaction, whether directly or indirectly,—as by payment of interest—after attaining majority he was thereafter barred from impugning it within the remainder of the *quadriennium utile*.[2]

A minor with a curator could not validly bind himself without the curator's consent, and any obligation so undertaken by him might be afterwards challenged, even although there was no allegation of fraud, but only of prejudice; but if the curator's consent had been obtained the transaction could not be thereafter challenged.[3]

The remedy of *restitutio in integrum* was not confined to minors, but might be also granted by the Praetor, in the exercise of his *imperium* and of his equitable discretion, to persons over majority; and a transaction that was otherwise legally valid might be rescinded if the person claiming restitution could prove serious injury (*laesio*) by reason of it, and could, at the same time, satisfy the Praetor that he had, in the circumstances, a good ground (*justa causa*) for the application, such as minority, fraud (*dolus*[4]), intimidation (*metus*[5]), error,[6] or absence in circumstances regarded by the law as sufficient to justify such a claim, as State service, confinement, slavery, or captivity.[7]

In the case of persons over majority a claim for restitution required to be made within a year from the earliest opportunity available to apply for relief.[8]

Section 15.—Limitation of Legal Capacity by Mental Condition

A person's capacity to perform legal acts, and to exercise legal rights and incur legal duties, might also be limited or qualified, either wholly or partially, by the mental condition of the individual.

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[1] *Code*, ii. 52.

[2] *Dig.* iv. 4, 3, ss. 1 and 2.

[3] *Code*, ii. 22, 3. See further as to Minors and Curators, *post*, Chapter VII. See on legal capacity of minors generally, *Dig.* iv. 4. See also, on the restitution of minors, Roby, *Roman Private Law*, ii. 259; Hunter, *Roman Law*, 608; Mackenzie, *Roman Law*, 155; Girard, *Manuel de Droit Romain*, 223 *et seq.* (5th ed., 231); May, *Éléments de Droit Romain*, 144, 145; Didier-Pailhé, *Droit Romain*, i. 113.

[4] See *post*, Part IV.

[5] See *post*, *ibid.*

[6] See *post*, *ibid.*

[7] See on restitution *in integrum* to persons over majority, *Dig.* iv. 6; also Roby, *Roman Private Law*, ii. 262; Muirhead, *Roman Law*, 350.

[8] *Dig.* iv. 6, 1.

The mental condition giving rise to the limitation of a person's legal capacity might be due to either (*a*) tenderness of age and consequent inexperience and imprudence, or (*b*) actual mental unsoundness due to disease. When the limitation of capacity was solely due to youth and inexperience the incapacity was only partial and temporary, but if it was due to actual mental disease the limitation was absolute.

By the Roman Law legal incapacity by reason of mental weakness might arise under four sets of circumstances, namely, insanity, impuberty, minority, and prodigality, and the degree of incapacity varied in each of these cases.

(a) *Incapacity due to Insanity and to Infancy*

The legal incapacity of the insane was absolute. Such persons were regarded as having no will of their own and so incapable of incurring any obligations involving consent, whether in the character of creditor or of debtor, because they entirely lack understanding (*intellectus*) and judgment (*judicium*), or the capacity to comprehend the effects of their actions.[1]

Insanity might assume the form of either acute madness, known as *furor*, or imbecility, which was styled *dementia*; but the form of the insanity was immaterial so far as regarded its effects, which were the same in each case.[2]

A person suffering from insanity may have periods of clear and normal mental conditions known in modern phraseology as "lucid intervals"; and the Roman Law recognised that valid legal acts might be performed, and obligations be incurred, and consent be given during such periods as would legally and effectually bind both the insane person and others.[3] Thus a will executed by an insane person during a lucid interval was valid, as was also one made before the person became insane;[4] but, on the other hand, a testament executed by a person legally incapable of doing so was not validated by his subsequent acquisition of capacity.

The legal incapacity of INFANTS was also, by the Roman Law, as absolute as that of the insane, because in the case of the latter the mental disease, and in the case of the former the limited degree of mental development natural to extreme tenderness of years, renders them equally and wholly incapable of understanding and judgment.[5]

(b) *Incapacity due to Impuberty and to Minority*

The legal incapacity occasioned by reason of the mental weakness due to impuberty and to minority on account of youth and inex-

[1] Justinian, *Inst.* iii. 19, 18, 8; Gaius, *Inst.* iii. 106; *Dig.* xliv. 7, 1, 12; *Dig.* l. 17, 40.

[2] *Code*, v. 4, 25.

[3] *Code*, iv. 38, 2.

[4] Justinian, *Inst.* ii. 12, 1.

[5] Justinian, *Inst.* iii. 19, 10; Gaius, *Inst.* iii. 109. See *ante*, p. 86.

perience, and consequent lack of judgment and prudence, was not absolute, but was only partial, and varied in degree; the law naturally attributed greater inexperience and therefore conceded less legal capacity to a pupil (*impubes*) than to a minor.[1]

(c) *Incapacity due to Prodigality*

The Roman Law regarded the inability of spendthrifts or unduly extravagant persons to prudently control and manage their affairs as a form of mental weakness, and therefore limited their legal capacity in various ways.

In order to protect "prodigal" or unduly extravagant persons (*prodigi*) of either sex [2] from the injurious consequences of their own recklessness, and to preserve their property from being dissipated, they might be prohibited or interdicted by the Praetor from managing their own property, the care of which was then given to a *curator* without whose approval the spendthrift or prodigal (*prodigus*) was thereafter incapable of incurring any obligations, or of disposing of, or of burdening his property.[3]

This restriction of the legal capacity of prodigals was part of the customary law of Rome even before the "Twelve Tables," [4] in which it was embodied, and upon which it was subsequently based.[5]

SECTION 16.—LIMITATION OF LEGAL CAPACITY BY SPECIAL CIRCUMSTANCES

The legal capacity of a person might not only be limited, according to the Roman Law, by reason of the facts of birth, sex, age, or mental condition, but also on account of certain special circumstances such as office, alienage, physical defect, subjection to *potestas*, celibacy, childlessness, *infamia*, or religion.

(a) *Incapacity due to Office*

In certain cases the Roman Law limited the legal capacity of certain persons, not on account of any mental weakness, or because of any defect in their legal *status*, but by reason of the fact that they happened to hold a particular office, and that, consequently, their own interests might be brought into conflict with the interests of those very persons whose interests, in virtue of their office, it was their special duty to protect.

Amongst those persons whose capacity was thus specially limited

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[1] See *ante*, p. 85, "Incapacity due to Age." See also "Tutory and Curatory," *post*, Chapter VII.

[2] See Paul, *Sent.* iii. 4, 6.

[3] *Dig.* l. 17, 40; Paul, *Sent.* iii. 4, 7; Ulpian, *Reg.* xii. 3; *cf.* French Civil Code, Arts. 489, 499, 513.

[4] *Dig.* xxvii. 10, 1 pr.

[5] *Cf.* Justinian, *Inst.* i. 23, 3. See Moyle, *Inst.* 169, 170.

were tutors, curators, and public officials. Thus tutors and curators were not entitled to buy for themselves property belonging to their pupils or wards respectively;[1] and public officials were forbidden, on the same principle, to buy property which it might be their duty to sell in the ordinary exercise of their public functions. This rule was not invariable, however, and in certain exceptional circumstances might be relaxed. A tutor, for example, might competently purchase property belonging to his pupil ward if the property purchased was sold by a creditor;[2] or if the administration of the estate was divided up amongst co-tutors and the property purchased did not form part of the property of the pupil administered by the purchasing tutor, provided that the co-tutor who actually administered the portion of the property of which that purchased formed part gave his consent.[3] The holding of a particular office might also limit, in certain circumstances, a person's capacity to marry.[4]

(b) *Incapacity due to Alienage*

Aliens or "peregrins" (*peregrini*) could not competently be parties to any transaction that was governed by the strict *jus civile* unless they possessed the privilege of *commercium*.

(c) *Incapacity due to Physical Defect*

A person's legal capacity might be limited by reason of the possession of certain merely physical defects. The Justinianian law placed the deaf, the dumb, and the incurably diseased under curatory,[5] but exempted blind persons upon the ground that being able to speak they could appoint procurators.[6] Thus neither deaf nor dumb persons could enter into a stipulation, for it was essential to a contract in that form that parties should both speak and hear each other speak;[7] on the same ground such persons could not make a will *per aes et libram*, because a dumb person could not speak the words of the *nuncupatio*,[8] while the deaf person could not hear the words of the *familiae emptor*;[9] but this special incapacity ceased when wills were executed in writing.[10]

[1] See *Dig.* xxvi. 8, 1 pr. on the rule of law that a tutor could not be *auctor in rem suam*.

[2] *Dig.* xxvi. 8, 5, 5.

[3] See *Dig.* xxvi. 8, 4; xxvi. 8, 6; *Code*, v. 59, 5; cf. *Dig.* xxix. 2, 49.

[4] Cf. *Dig.* xxiii. 2, 38 pr.; xxiii. 2, 63; xxiii. 2, 36. See "Impediments to Marriage," *post*, Chapter VI., Section 39.

[5] Justinian, *Inst.* i. 23, 4; *Dig.* xxvii. 10, 2.

[6] Paul, *Sent.* iv. 12, 9.

[7] Justinian, *Inst.* iii. 19, 7; Gaius, *Inst.* iii. 105; *Dig.* xliv. 7, 1, 15.

[8] See Gaius, *Inst.* ii. 104; Muirhead, *Roman Law*, 2nd ed., 132; Sandars, *Institutes of Justinian*, 165.

[9] See p. 93, note 1.

[10] Ulpian, *Frag.* xx. 13

Similarly deaf and dumb persons could not be tutors, for they could not give the verbal consent involved in the *auctoritas*.[1]

Deaf persons were those who could not hear at all, and dumb persons were those who could not speak at all, and there were not, therefore, included within these categories, either those who heard or those who spoke merely with difficulty.[2] The will of a person who, subsequent to its execution, became either deaf or dumb, remained nevertheless, valid;[3] and a person who was neither deaf nor dumb from birth might competently make a will, in terms of an Imperial Constitution.[4]

Deaf and dumb persons could not competently act as witnesses to the making of a will;[5] but they possessed, notwithstanding, what was known as *testamenti factio*.[6] This term had a threefold signification in the Roman Law, and meant the capacity either (1) to make a will, or (2) to take or acquire under a will, or (3) to be a witness to a will. Deaf and dumb persons, although they could neither make a will, nor be a witness to a will, could yet competently acquire by will either for themselves or others.[7]

Soldiers who became either deaf or dumb were specially exempted from the application of the ordinary rule of law, and they might competently make a will which would enjoy the privileges attaching to a military testament.[8]

A person blind, whether from birth or through illness, could not competently make a will unless he conformed to certain special requirements of the law to the effect that, in addition to the seven witnesses ordinarily necessary, there should be present a notary (*tabularius*), or, failing him, an eighth witness, who was able to write, who, in presence of all the other witnesses, should either write the testament to the blind person's dictation, or read aloud to him the testament previously prepared;[9] thereafter the testament was to be signed and sealed by them all, including the notary or the eighth witness as the case might be, in the usual manner. These special requirements regarding the blind were prescribed in a Constitution of the Emperor Justin, which,

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[1] *Dig.* xxvi. 1, 17.
[2] Justinian, *Inst.* ii. 12, 3.
[3] Justinian, *Inst.*, *ut sup.*
[4] *Code*, vi. 22, 10.
[5] Justinian, *Inst.* ii. 10, 6.
[6] Justinian, *Inst.* ii. 19, 4; *Dig.* xxviii. 5, 49, 1; xxviii. 1, 16, 1.
[7] Justinian, *Inst.* ii. 19, 4.
[8] Justinian, *Inst.* ii. 11, 2; *Dig.* xxix. 1, 4.
[9] *Code*, vi. 22, 8.

however, merely regulated thereby the execution of such wills, but did not originate them, for they seem to have been always competent.

(d) *Incapacity due to Subjection to Potestas*

The general rule of the Roman Law was, for long, that a *filiusfamilias* in his private capacity could not acquire property for himself, and any right he might acquire vested in the person in whose *potestas* he happened to be. Thus, although a *filiusfamilias*, or son subject to the family authority (*potestas*) of a *paterfamilias*, had *commercium*, in respect of which he could acquire by *mancipatio*, yet property so acquired vested in his *paterfamilias*; he could make a valid contract, but the contractual rights and benefit vested in the *paterfamilias*; he had *testamenti factio* in respect of which he might be witness to a will, or balance-holder (*libripens*), or *familiae emptor*;[1] but he could not make a will, as he could not, under the general rule, have any property of his own to bequeath; he might acquire under a will, as heir or as legatee, but the right so acquired vested in his *paterfamilias*.[2]

A *filiusfamilias* possessed citizenship (*civitas*) and so could contract a valid civil marriage, but the *patria potestas* or the *manus*, or both, resulting from such marriage vested in his *paterfamilias*. A *filiusfamilias* could not be either creditor or debtor to his *paterfamilias*, but in his relations to third parties the general rule of law was that, although he could not be a creditor, he might competently be a debtor and be sued upon his obligations, while any benefit arising from such obligations accrued to the *paterfamilias*.[3]

The general rule regarding the incapacity of a *filiusfamilias* was qualified in certain special respects. Thus it only applied to him in his private capacity and functions, and had no application to him in his public character,[4] in respect of which all public offices were open to him, and, if he was of full age,[5] he might even competently act as a tutor, that office being regarded as a public one (*munus publicum*).[6] Moreover, a *filiusfamilias* might competently sue on his own behalf, and even contrary to the wishes of his *paterfamilias*, the *actio injuriarum* for injuries done to him,[7] the *actio quod vi aut clam* for violent or clandestine disturbance, the *actio depositi* upon a contract of deposit, and the *actio*

[1] See on *Familiae Emptor*, Justinian, *Inst.* ii. 10, 1; Gaius, *Inst.* ii. 101-104; Muirhead, *Roman Law*, 64; Poste, *Gaius*, 179.

[2] Gaius, *Inst.* ii. 87, 89; Justinian, *Inst.* ii. 9, 3.

[3] Justinian, *Inst.* iii. 19, 6; Gaius, *Inst.* iii. 104; *Dig.* xliv. 7, 39; xlv. 1, 141, 2; xlvi. 4, 8, 4. See Poste, *Gaius*, 40-41, 385.

[4] *Dig.* xxxvi. 1, 14 pr.

[5] *Cf.* Justinian, *Inst.* i. 25, 13; *Code*, V. 30, 5.

[6] *Dig.* i. 6, 9; Justinian, *Inst.* i. 14 pr.

[7] *Dig.* xliv. 7, 9. *Cf.*, however, Hunter, *Roman Law*, 195, 196, as to the circumstances in which a son under *potestas* could sue an action for injury.

commodati upon a contract of loan for use,[1] and, generally, the innominate equitable contracts.[2]

It is to be observed that the incapacities of a son under *potestas* were purely temporary, and were terminated by the death of the *paterfamilias*, if not earlier by *forisfamiliation*, or emancipation from paternal authority.

Under Imperial legislation and the later Roman Law the proprietary rights of a *filiusfamilias* became largely extended, and he became entitled to acquire for himself and to dispose as he pleased of property as *peculium* in the various forms of *peculium castrense*, *peculium quasi-castrense*, and *peculium adventitium*.[3]

(e) *Incapacity due to Celibacy and to Childlessness*

Certain laws were enacted by the Emperor Augustus with a view to encourage lawful marriage and the birth of legitimate children, and, at the same time, to check the decrease in the free population arising from the degeneration of public morals and the corrupt state of Roman society at that time.

The *Lex Julia* (4 A.D.)[4] and its amending Act the *Lex Julia et Papia Poppaea*[5] (9 A.D.) imposed, with certain special exceptions, restrictions upon the capacity of unmarried persons (*coelibes*), and of married persons, of both sexes, who had no living legitimate children. An unmarried person of either sex was signified by the term *coelebs*, which comprised both a person who had never been married, and one who was a widower or a widow.

Under the *Lex Julia* of 4 A.D. a man who remained unmarried (*coelebs*) between the ages of twenty and sixty, and a woman who continued unmarried till fifty,[6] were not entitled to take under a will, whether as legatee or as heir, of a person to whom they were not related (*cognati*) within the sixth degree, unless they married within a certain time after becoming aware of their rights.[7]

The *Lex Papia Poppaea* (9 A.D.) restricted the capacity of childless persons (*orbi*), and prohibited a married man over twenty-five or a married woman over twenty from taking more than one-half of what

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[1] *Dig.* xliv. 7, 9; xvi. 3, 19.

[2] *Dig.* xliv. 7, 13. See Poste's *Gaius*, 42, 43, for a statement of the principles upon which these modifications of the general rule were based; on the "Innominate Contracts," see Part IV.

[3] See "*Peculium*," *post*, Chapter VI., Section 31.

[4] *De maritandis ordinibus.* This statute is sometimes ascribed to 18 B.C. and 13 B.C.

[5] Otherwise known as the *Lex Julia*, *Lex Julia Caducaria*, *Lex Papia*, *Lex Papia Poppaea*.

[6] Ulpian, *Reg.* 16, 1.

[7] Ulpian, *Reg.* 14, and 17, 1, 22, 3. Men had usually accorded to them one hundred days from the death of the testator, while women were allowed two years from the death of a husband and eighteen months from the date of divorce, within which to marry.

was bequeathed to them by a person outside the sixth degree of relationship, if they had no legitimate children living at the time when the right accrued to them under the testament.[1] Such a person of either sex was designated by the term *orbus*.

A man was exempted from the operation of the *Lex Papia Poppaea* if he had one living legitimate child; a free-born woman was exempted if she had three, and a freed woman if she had four lawful children.

Under the *Lex Papia Poppaea*, also, a husband and wife whose marriage was childless could only take under each other's wills one-tenth part of what was bequeathed to them thereunder,[2] and were entitled only to the usufruct of one-third of the residue from which they were thus excluded.[3]

The restrictions based upon celibacy (*coelibatus*) and childlessness (*orbitas*) were abolished by legislation of the Emperors Constantius and Constans, and Honorius and Theodosius,[4] and did not exist under Justinian.[5]

(f) *Incapacity due to Infamy or to Religion*

It has been already stated that "infamy" (*infamia*), or loss of public esteem as a citizen, involved certain legal disabilities.[6]

Religion also, in certain circumstances, imposed special restrictions upon a person's capacity.

"Heretics" and "apostates," and such like, were subject to various disabilities; they could not be witnesses to the making of a will,[7] or give evidence in Court;[8] they could not be instituted heirs,[9] their testamentary capacity was restricted,[10] and they were excluded from the benefits of the operation of the constitution of Justinian which reformed the law of intestate succession and based it upon cognatic in place of agnatic relationship.[11]

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[1] Ulpian, *Reg.* 16, 1.

[2] This portion was known as *lex decimaria*.

[3] The portion of the property which thus lapsed under the operation of this Act was styled *caduca*; hence the name *Lex Caducaria* sometimes applied to the *Lex Papia Poppaea*. See further on "*Lex Julia*," *post*, and Muirhead, *Roman Law*, 285, 286.

[4] *Code*, viii. 58, 1; *ibid.* 2.

[5] See upon this ground of incapacity, Moyle, *Inst.* 265; Hunter, *Roman Law*, 798; Sandars' *Institutes of Justinian*, 8th ed., 228; Sohm, *Institutes of Roman Law*, 3rd ed., 478.

[6] See *Existimationis minutio—infamia*, *ante*, p. 77.

[7] *Code*, i. 3, 21; *Code Th.*, xvi. 7, 4.

[8] *Code*, i. 5, 21.

[9] *Code*, i. 5, 4; i. 7, 3.

[10] *Code*, i. 5, 4; i. 5, 13, 1.

[11] *Nov.*, 118, 6.

CHAPTER IV

Section 17.—Divisions of Persons

In treating of "persons" the Roman Law and the Roman jurists made two great general divisions of all mankind: they distinguished between (1) persons who are free and persons who are not free;[1] and (2) persons who are not subject to authority (*sui juris*), and persons who are subject to authority (*alieni juris*).[2]

Free persons were then particularly considered in different aspects according as they were (1) citizens (*cives*), or non-citizens (*peregrini*); (2) citizens either (*a*) independent of, or (*b*) subject to, the authority of another person—in other words, according as they were *sui juris* or *alieni juris* respectively; or (3) subject to tutory (*tutela*) or curatory (*cura*).[3]

It was requisite, according to the Roman Law, in order to invest a man with a complete legal *persona* or character, free from disabilities, that he should be (1) free, (2) a citizen (*civis*), (3) independent of authority (*sui juris*), and (4) not subject to either tutory (*tutela*) or curatory (*cura*).

(a) *Roman Citizens (Cives) and Foreigners (Peregrini)*

Roman citizenship, in its fullest sense, comprised both political and civil rights.

The political or public rights which citizenship involved were those of voting in the various *Comitia* or public assemblies, and filling public offices; these rights were signified by the expression *jus suffragii et honorum.*

The full civil or private rights of Roman citizenship under the *jus civile* were signified by the terms *connubium*[4] and *commercium*,[5] which were what essentially distinguished the Roman citizen from all other persons.[6]

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[1] Justinian, *Inst.* i. 3.

[2] Justinian, *Inst.* i. 8.

[3] *Cf.* Cuq, *Institutions Juridiques des Romains*, ii. 68, 69.

[4] Ulpian, *Frag.* v. 3.

[5] Ulpian, *Frag.* xix. 5.

[6] The right of *actio* may also be added. This term, in its special sense, signified capacity to be a party to a *legis actio* or an action in the form peculiar to the strict

Connubium or the *jus connubii* was "the right of marriage," and signified a special right, peculiar to Roman citizens, to contract a valid marriage according to the forms of the *jus civile*, and to acquire thereby certain peculiar legal rights, particularly the paternal power, known as *patria potestas*,[1] and the relationship of "agnation."[2]

Commercium or the *jus commercii* was "the right of business," and it entitled the person who possessed it to make "civil" contracts,[3] and to acquire, own, and dispose of property of all kinds according to the special forms peculiar to the strict *jus civile*,[4] and to enjoy any privileges attaching thereto.

(b) *Legal Disabilities of Foreigners (Peregrini)*

A free-born person was styled *ingenuus*, which term signified a person born free, whether of free-born parents in lawful marriage, or of parents who had been freed (*libertini*), or of parents one of whom was free-born and the other freed, or of parents one of whom was not free if the mother was either free-born or freed.[5] A person who was not born free, but had acquired freedom by manumission,[6] was styled *libertinus*.[7]

Free persons thus comprised free-born persons (*ingenui*), and those who had been made free (*libertini*).[8] Free-born persons were divided, by the Roman Law, into two great classes, namely, citizens (*cives*) and "peregrins" or foreigners (*peregrini*), according as they possessed or did not possess those rights of Roman citizenship, public and private, which have been already mentioned.[9]

For long, foreigners, or "peregrins," within the Roman State enjoyed neither political nor civil rights; they could not acquire, or hold, or transfer property by the forms of the *jus civile*, and at the same time their own private rights were neither recognised nor protected by the Roman Law to the extent of allowing them to assert their rights by means of its forms and procedure.

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jus civile, and "employed for the vindication, protection, or enforcement of a right either included in or flowing from *connubium* or *commercium*, or directly conferred by a statute that embraced only citizens in its purview" (Muirhead, 105).

[1] See *post*, Chapter VI.

[2] See *post*, *ibid.*

[3] E.g. *nexum*, *sponsio*.

[4] As by mancipation, cession in Court (*in jure cessio*), or *usucapion*. See *post*, Part III.

[5] Justinian, *Inst.* i. 4 pr. In short, a person was *ingenuus* who was born of a free mother (*Dig.* i. 5, 5, 2).

[6] See *post*, p. 109.

[7] Justinian, *Inst.* i. 5 pr.; Gaius, *Inst.* i. 11; *Dig.* i. 1, 4; i. 5, 6.

[8] Gaius, i. 10. See Justinian, *Inst.* i. 4 (*de ingenuis*); *Inst.* i. 5 (*de libertinis*).

[9] *Ante*, p. 96.

The marriages of peregrins came, indeed, to be regarded in course of time as lawful unions and not as mere promiscuity, but these did not constitute legal or "regular" marriage (*justae nuptiae*[1]) as understood by the *jus civile*, and therefore none of the ordinary legal effects of a Roman marriage resulted from them; such unions did not give rise to *patria potestas* such as accrued to a Roman citizen in virtue of *justae nuptiae*, and did not create the special legal relationship or tie of agnation,[2] or give any legal rights of succession. But the unions of peregrins were regarded by the Roman Law as creating a natural relationship by blood known as cognation,[3] and the children of such unions were considered to be legitimate.

In course of time, as has been already stated,[4] the office of "Peregrin Praetor" (*praetor peregrinus*) was created in Rome, about 242 B.C., and a special tribunal was established for the administration of justice to foreigners in cases of dispute between foreigners amongst themselves, or between foreigners and Roman citizens. The law applied in that tribunal was not the *jus civile*, but consisted of those natural principles of equity and justice, common to the legal systems of all nations and applicable to the legal relations of all free persons, and known in the Roman legal system as the *jus gentium*.[5] The *jus gentium* was free from the rigid technicalities of the *jus civile*; it recognised the validity and binding character of contracts made in modes other than those of the strict *jus civile*, and recognised rights arising from such informal methods as mere "occupation"[6] and mere "tradition" or delivery of property, and also those rights arising from "accession"[7] or natural increase.

Three main causes contributed to the gradual removal of the legal disabilities from peregrins; those were (1) the development of the principles of the *jus gentium*; (2) the creation of the status known as Latinity (*latinitas*); and (3), the extension of Roman citizenship.

"Latinity" (*latinitas*) was a modified or limited form of Roman citizenship, created towards the close of the Republic, in respect of which non-citizens might enjoy the right of *commercium* without at the same time possessing the right of *connubium*.

"Latins" (*latini*), or persons possessing the rights pertaining to "Latinity," thus came to form an artificial class intermediate between Roman citizens and peregrins in respect of the possession of what

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[1] See "Marriage," *post*, Chapter VI., Section 37.
[2] See *post*, Chapter VI.
[3] See *ibid.*
[4] Part I., Chapter I., *ante*, p. 29.
[5] See Part I., Chapter II., *ante*, p. 57.
[6] See *post*, Part III., "Law of Things."
[7] See *post*, *ibid.*

the jurists styled the *jus Latii*[1] or the right of Latin colonists (*latini coloniarii*); these *coloniarii* were distinguished from *peregrini* by the possession of *commercium*, and from *cives* in that they did not possess *connubium*. "Peregrins" (*peregrini*) were thus foreigners who were not invested with either citizenship (*civitas*) or "latinity" (*latinitas*). The right of *commercium* or of *connubium*, or both, was occasionally granted directly to peregrins, but only in exceptional cases and as a special privilege.

Legal means were provided, in course of time, by which the limited status of "Latinity" could be converted into full Roman citizenship;[2] the rights of Roman citizenship were themselves gradually extended by successive Emperors so as to include an increasing number of the inhabitants of the Empire, until finally the Emperor Caracalla in 212 A.D. bestowed them upon all the free subjects of the Roman State.[3] From that time the distinction between citizens, "peregrins," and "Latins" ceased to exist, and by the time of Justinian it was of merely historical interest.[4]

SECTION 18.—ROMAN CITIZENSHIP (CIVITAS)

The status of Roman citizenship was both acquired and lost in three different ways.

How Citizenship was Acquired.—Citizenship was acquired by (1) birth; (2) manumission; (3) grant.

(a) *Acquisition by Birth.*—The status of a child born in lawful marriage was determined by that of the father at the time of the child's conception, so that if the father was at that point of time a Roman citizen the child became one on birth. A child that was not the issue of lawful marriage—that was, in other words, in the view of the law illegitimate—had its status determined according to that of the mother at the time of its birth.[5]

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[1] The term *jus Latii* came to be thus used because the limited rights thus accorded to non-citizens were similar to those that had been originally granted to the inhabitants of Latium, and subsequently to those of Italy generally, by the *Lex Julia et Plautia de Civitate* in B.C. 89. "Junian Latins" were informally manumitted slaves who by the *Lex Junia*, the date of which is uncertain but passed probably early in the reign of Augustus—some authorities think even before the *Lex Aelia Sentia* (A.D. 41)—had accorded to them the same rights as the old *Latini*. See Muirhead, p. 317, and note 6, *ibid.*; also see "Slavery," *post*, Chapter V., p. 102.

[2] See Hunter, *Roman Law*, 673, 674.

[3] *Dig.* i. 5, 17.

[4] See upon "Latinity" and *Jus Latii*, Muirhead, *Roman Law*, 249, 250, also 317, 318; Mackenzie, *Roman Law*, 78, 79; Roby, *Roman Private Law*, i. 22 *seq.*; Hunter, *Roman Law*, 198; Poste, *Gaius*, i. 131, and i. 22, Commentary; Girard, *Manuel de Droit Romain*, 104-107 (5th ed., 108-111); May, *Éléments de Droit Romain*, 81. See upon the position of peregrins and non-citizens generally, Muirhead, 103-108, and 249, 250; Girard, 107-112 (5th ed., 111-118); May, 81-83.

[5] See *ante*, p. 84, Chapter III., Section 12; also Roby, *Roman Private Law*, i. 20.

(b) *Acquisition by Manumission.*—The manumission or conferring of freedom upon the slave of a Roman citizen in one or other of the modes, formal or informal, prescribed or recognised by the Justinianian law rendered the slave thereby a Roman citizen. This rule was for some time modified by the terms of the *Lex Aelia Sentia*[1] (4 A.D.), and the *Lex Junia Norbana*[2] (19 A.D.), according to which informally manumitted slaves acquired thereby only the limited citizenship of Latin colonists (*latini coloniarii*) in respect of which they were known as "Junian Latins"[3] (*latini Juniani*). Justinian enacted, however, that manumission should once more imply the acquisition of full Roman citizenship, and he at the same time abolished all distinctions between freedmen.

Before the abolition of these distinctions by Justinian freedmen (*libertini*) had been divided into three classes or grades—*Liberti*, *Latini Juniani*, and *Dediticii*.[4] *Liberti* were those freedmen who had obtained full rights of citizenship on manumission; *Latini Juniani* were those freedmen who on manumission received, in terms of the *Lex Junia*,[5] only the limited rights of citizenship accorded to Latin colonists[6] (*latini coloniarii*), in respect of which they possessed *commercium* but not *connubium*. They could acquire, hold, and transfer property upon a "quiritarian" title, which expression signified that they had the legal capacity to employ the modes recognised by the strict *jus civile* as competent only to Roman citizens in virtue of that element in their citizenship (*civitas*) styled *commercium*, for the creation, protection, vindication, or enforcement of their rights.[7]

Junian Latins could not make or take under a testament, for the *Lex Junia* denied them *testamenti factio* to that extent, although they might be witnesses to a will, or act as *libripens*, or as *familiae emptor*, and they could not competently be named as guardians in a testament.[8] Although Junian Latins could not take directly as heirs or as legatees under a testament, they might yet competently take indirectly as beneficiaries under a *fidei commissum* or trust.[9] Junian Latins did not possess *patria potestas*, because that was an incident flowing from *connubium* which they did not acquire by the fact of manumission.[10]

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[1] See *post*, p. 109, "Manumission."

[2] *Ibid.*

[3] See *ante*, p. 99, note 1; also "Manumission," *post*, p. 109.

[4] Gaius, *Inst.* i. 12.

[5] So styled by Gaius and Ulpian. Justinian refers to it as the *Lex Junia Norbana* (*Inst.* i. 5, 3). See further, "Slavery," *post*, Chapter V.

[6] Gaius, *Inst.* i. 22.

[7] See, on "quiritary" ownership, Gaius, ii. 40, 41; Poste, *Gaius*, Commentary, 151 *et seq.*; also *post*, Part III., "The Law of Things."

[8] Gaius, *Inst.* i. 23; Ulpian, *Frag.* xx. 14.

[9] Gaius, *Inst.* i., 24.

[10] *Cf.* on the capacities of "Junian" Latins, and of Latins generally, Muirhead, *Roman Law*, 317; Poste, *Gaius*, i. 22; Commentary, p. 27.

Deditícii were enemies who had surrendered at discretion under arms.[1] The *Lex Aelia Sentia* (5 A.D.) placed slaves who had been guilty of serious crime or misconduct in the position of *deditícii* or surrendered aliens, if they were subsequently manumitted. In respect of this provision of the law such persons possessed no political rights, and the barest civil ones; they could not convert their position into full citizenship, and were, moreover, forbidden to live within one hundred miles of Rome under pain of servitude.[2]

(c) *Acquisition by Grant.*—During the Republican period of Rome's history citizenship was frequently conferred, as a special favour, by either the *Comitia* or the Senate, upon not only particular individuals but also upon entire communities; and during Imperial times the Emperors were in the habit of doing the same thing.[3] Such a grant of citizenship corresponded with what, in modern times, is known as "naturalisation." The extension of Roman citizenship reached its climax when the Emperor Caracalla, by a Constitution, about 212 A.D., conferred citizenship upon all the free inhabitants of the Roman world.[4]

SECTION 19.—HOW ROMAN CITIZENSHIP WAS LOST

Roman citizenship was lost, in the first place, by loss of liberty, as by capture in war. If, however, a citizen who was taken captive recovered his liberty, his citizen rights revived as soon as he re-crossed the Roman boundaries in virtue of the *jus postliminii*; if, on the other hand, he never returned, or died in captivity, he was presumed by the law to have died at the moment of capture.[5]

Roman citizenship was lost, in the second place, by renunciation, as when a Roman citizen voluntarily became a member of another state; and it was lost in virtue of a sentence of deportation or exile as a punishment for crime.[6]

Roman citizens might also, without actually losing either their liberty or their citizenship, have both their public and private rights seriously curtailed if they were guilty of dishonourable conduct implied in such crimes or offences as robbery, theft, fraud, or perjury, all of which involved "infamy" (*infamia*), as did also expulsion from the army and disreputable modes of living, and, generally, acts involving a gross degree of wickedness or turpitude.[7]

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[1] Gaius, *Inst.* i. 14.

[2] Gaius, *Inst.* i. 25, 27. See on acquisition of citzenship by manumission, Roby, i. 24-28.

[3] See Roby, *Roman Private Law*, i. 22, 24; Mackenzie, *Roman Law*, 78, 79.

[4] *Dig.* i. 5, 17. Justinian erroneously attributes this Act to the Emperor Antoninus Pius (*Nov.* 78, 5).

[5] See on *postliminium*, *ante*, Chapter III., p. 72.

[6] See on Deportation, Chapter III., Section 5.

[7] See *Infamia* and *Minutio Existimationis*, *ante*, p. 77.

CHAPTER V

Section 20.—Slavery[1]

Slavery as an institution was closely identified with and involved in both the public and private life of the Romans. The Roman jurists professed that, in principle, all men, according to natural law (*jus naturale*[2]), are free, and that slavery was a creation of the law and general customs of all peoples. They accordingly defined slavery as "a creation of the *jus gentium*[3] by which a man is subjected, contrary to nature, to ownership on the part of another."[4]

Section 21.—Constitution of Slavery

According to the Roman Law, slavery might arise in any of three ways—namely, by (1) capture in war; (2) birth; (3) judicial sentence. The first two modes were ascribed to the Law of Nations, and the third to the *jus civile*.[5]

(a) *Slavery by Capture*

Prisoners of war were regarded by the Romans as the absolute property of their captors; instead of being slain their lives were often spared, and they were either set to work for the benefit of the State or sold to private purchasers. The law required, however, that the capture should have taken place in regular warfare; so that the capture of citizens by brigands, or by pirates, or in civil war, did not give their captors any legal right to them as slaves, and they remained legally free, and retained their rights as free citizens.[6]

(b) *Slavery by Birth*

The issue of a slave woman was born a slave, for the children of female slaves had their status determined by the same principle as was

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[1] See Buckland, *The Roman Law of Slavery* (Cambridge University Press, 1908).

[2] See Part I., Chapter II.

[3] *Ibid.*

[4] *Dig.* i. 5, 4, 1; Justinian, *Inst.* i. 3, 2. See also Gaius, *Inst.* i. 52; *Dig.* i. 6, 1.

[5] Justinian, *Inst.* i. 3, 4; *Dig.* i. 5, 5, 1.

[6] *Dig.* xlix. 15, 24; xlix. 15, 19, 2; xlix. 15, 21, 1. See *ante*, pp. 72, 73, *Capitis deminutio.*

applied to illegitimate children, and they followed the social condition of their mother at the time of their birth.[1] If, however, a slave mother had been free for any period, however short, between the time of the conception and that of the birth of the child, the law regarded the child as born free, and that even although the mother might have again become a slave before the child was born, it being considered that in such a case an unborn child ought not to be prejudiced by the misfortune of the mother.[2]

The offspring of a slave woman and a free man was born a slave, but that of a free woman and a male slave was considered to have been born free, upon the general principle.[3]

(c) *Slavery by Judicial Sentence*

A free Roman citizen might be condemned to slavery for what were regarded as specially heinous offences.[3] Condemnation for a capital crime rendered the convicted person a "slave of punishment" (*servus poenae*). Persons who were condemned to death or to work in the mines or to fight with wild beasts or with gladiators became "slaves of punishment" (*servi poenae*), or "slaves without a master" (*servi sine domino*), or slaves of the State.[4]

The Emperor Constantine abolished fighting with wild beasts as a punishment;[5] and Justinian not only abolished the class of *servi poenae*, but also forbade the infliction of slavery as a punishment for crime.[6]

Evasion of military service by failing to be put upon the census roll rendered a citizen liable to slavery;[7] also a collusive sale whereby a free citizen over twenty years of age fraudulently allowed himself to be sold as a slave in order to share in the price,[8] it being a principle of the law that one Roman could not be the slave of another Roman, and that the sale of a free man was consequently void. But in order to incur this penalty it was requisite that there should be both a fraudulent intention to share the price and an actual taking of it,[9] and the person

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[1] See *ante*, pp. 84, 85.

[2] Justinian, *Inst.* i. 4 pr.; Gaius, *Inst.* i. 82, 89; *Dig.* i. 5, 5, 2.

[3] Justinian, *Inst.* i. 3, 4; i. 16, 1; *Dig.* i. 5, 5, 1; *cf.* Gaius, *Inst.* i. 160.

[4] *Dig.* xlviii. 19, 17 pr.; *Dig.* xlviii. 19, 8, 11.

[5] *Code*, xi. 43, 1.

[6] *Nov.* 22, 8; *Inst.* iii. 12, 1.

[7] *Dig.* xlix. 16, 4, 10; Cicero, *Pro Caecina*, 34, 11; Ulpian, *Reg.* 11, 11.

[8] Justinian, *Inst.* i. 3, 4; i. 16, 1; *Dig.* i. 5, 5, 1; xl. 12, 7, 1. This law is thought to have been introduced by Hadrian as a protection to purchasers (*Dig.* xl. 14, 2 pr.), but it is also supposed to have been part of the provisions of the *S.-C. Claudianum* (*Dig.* xl. 3, 5).

[9] *Code*, vii. 8, 1; *Dig.* xl. 13, 1 pr.

sold must have known that he was free,[1] while the buyer must have been ignorant of the fact.[2]

"Ingratitude"[3] on the part of a freedman towards his patron rendered him liable to be once more reduced to slavery.[4]

Under the *Senatus Consultum Claudianum*—ascribed to the Emperor Claudius[5]—a free woman who persisted in cohabiting with a male slave, without the consent of the slave's master, was herself liable to be reduced to slavery and adjudged a slave of the master; but this law was repealed by Justinian.[6]

Under the earlier law of the Twelve Tables a thief taken in the act (*fur manifestus*) was, if a slave, punished capitally by being thrown from the Tarpeian Rock; if a free man, he was adjudged as a slave to the person from whom he had stolen, after having been previously scourged. But the Praetorian Edict abolished this ground of slavery, and substituted a penalty of four times the value of the property stolen.[7]

Under the early law of *Nexum*, by which a man gave his own person in security of a debt, a creditor who had obtained judgment against his debtor might thereupon seize his debtor and keep him as his slave so long as he was unable to pay the debt.[8] This formal awarding or delivery of the person of a debtor to his creditor was known in the older law as *addictio*, and was part of the Law of the Twelve Tables. The *Lex Poetilia Papiria*—325 B.C.—relieved judgment debtors (*nexi*) from liability to slavery, while the extension of the principles of *pignoris capio* to private debts gave to creditors rights against the property of their debtors.[9] *Addictio* as a ground of slavery was, of course, obsolete long before the time of Justinian.

SECTION 22.—GENERAL POSITION OF A ROMAN SLAVE

According to the Roman Law, a slave had neither *caput* nor *status*, and possessed neither public nor private rights; they were, for the most part, regarded as things rather than as persons.[10] The unions of

[1] *Theodosian Code*, iv. 8, 2.

[2] *Dig.* xl. 12, 7, 2; xl. 12, 33.

[3] See "*Jus Patronatus*," *post*, Section 26.

[4] *Cf.* Justinian, *Inst.* i. 16, 1; Gaius, i. 160. See Hunter, p. 170, for a statement of the course of legislation upon this point.

[5] Tac., *Ann.* xii. 53.

[6] *Code*, vii. 24, 1; Justinian, *Inst.* iii. 12, 1. *Cf.* Gaius, *Inst.* i. 84, 91, 160.

[7] Gaius, *Inst.* iii. 189, 190; Justinian, *Inst.* iv. 1, 5. See Poste, *Gaius*, 411, Commentary.

[8] Aul. Gell. xx. 1.

[9] See upon *addictio* and execution for debt under the early law, Mackenzie, *Roman Law*, 361, 387, 388; Muirhead, *Roman Law*, 2nd ed., ss. 31, 36, and 37.

[10] See *ante*, p. 68.

slaves were not recognised by law; they were known as *contubernium*, and were regarded as mere cohabitation but not as marriage, for slaves were incapable of contracting marriage, and they did not give rise to any legal relationship or rights ordinarily flowing from marriage. But the unions of slaves were yet recognised to the extent of being regarded as creating ties of blood relationship (*cognatio*) between the offspring, to the effect of preventing them from marrying if they should subsequently become free.[1] The natural relationship created by *contubernium* was recognised by a "Constitution" of the Emperor Constantine in 334 A.D., which enacted that in sales or divisions of property by the Fisc, slaves who were nearly related by blood, such as father, mother, and child, should not be separated.[2] This rule was also followed in the division of inheritances; and natural relationship and ties of blood were further recognised by provisions of the law against a buyer breaking up a family in cases where a family of slaves was sold as one lot: the fact of one or more of the members being diseased entitled the buyer to repudiate the sale, but, in such circumstances, he was only entitled either to reject all or to retain all the family, and could not make a selection.[3] These provisions of the law were the outcome of a progressive humanity in the treatment of slaves and in the legislation having that object, which is noticeable in the history of the Empire from the time of the Emperor Claudius to that of Constantine. The authority that a Roman master exercised over the persons and the property of his slaves was known as the *dominica potestas*. A Roman master, during the period of the Republic, had an absolute power of life and death over his slaves,[4] and "the condition of the slave was at its worst in the golden period of Roman history."[5] During the Empire this absolute power possessed by the Roman master was restricted in various ways, and the position of the slave was ameliorated from time to time by various legal enactments, which, however, were based mainly on grounds of public policy,[6] and which, while limiting the rights of masters over their slaves, did not, at the same time, confer any correlative legal rights upon the slave, who always remained, in the eye of the Roman Law, rightless, without *persona*, *caput*, or *status*.[7] The object of the remedial legislation with regard to slaves was to protect them from wanton cruelty, of which there were many glaring instances during the degeneracy and licence of

[1] *Dig.* xxiii. 2, 14, 2.
[2] *Dig.* xxi. 1, 35; *Code*, iii. 38, 11.
[3] *Dig.* xxi. 1, 35; xxi. 1, 39; xxxii. 1, 41, 2.
[4] Gaius, *Inst.* i. 52; *Dig.* i. 6, 1, 1; Justinian, *Inst.* i. 8, 1.
[5] Poste, *Institutes of Gaius*, 37.
[6] *Cf.* Gaius, *Inst.* i. 53.
[7] *Cf.* Justinian, *Inst.* i. 16, 4; *Dig.* iv. 5, 3, 1; iv. 5, 4; *Nov. Theod.* 17.

the last years of the Republic and during the Early Empire; but, notwithstanding the legislation to check the abuse of dominical power (*dominica potestas*), a master still retained, in the time of both the Emperors Constantine and Justinian, a very wide power of punishment and of chastisement for domestic offences. Thus Constantine declared that a master was not liable for the killing of a slave in the course of *bonâ fide* punishment, as by flogging; but he was guilty of homicide if the death was occasioned by a wantonly cruel mode of punishment, or if he intended to kill.[1]

The condition of the slave may be gathered from an indication of the course of the legislation designed to limit the abuse of the dominical power and to afford protection to the slave. The slaying of another man's slave was, by the interpretation of later times, regarded as homicide within the meaning of the *Lex Cornelia de Sicariis* of 81 B.C., although such an act did not originally fall within the terms of that statute.

A *Lex Petronia*, and several supplementary *senatus-consulta* relating to it, of uncertain date, but which must certainly have been passed before the destruction of Pompeii in 79 A.D., as it is mentioned in an inscription found in that city, forbade masters to expose their slaves to contend with wild beasts without the previous sanction of a magistrate, and then only for an offence considered by the magistrate to warrant the punishment.[2]

The Emperor Claudius (41 A.D.) forbade the killing of a sick slave, and provided that if a master, in order to avoid the expense and trouble of cure, exposed a slave to perish, the exposure should operate as an involuntary manumission conferring freedom and "Latinity" (*Latinitas*).[3]

The Emperor Hadrian inflicted punishment for wanton maltreatment of slaves, and forbade the killing of slaves by their masters without the sanction of a magistrate. The same Emperor also forbade the torture of slaves in order to obtain evidence until there was established a *primâ facie* case against the accused person, and, further, limited torture under the *S.-C. Silanianum* to such slaves as were near enough to have heard what was doing,[4] and he endeavoured, moreover, to make more effective the legislation of the Emperor Domitian against the emasculation of slaves by bringing the offence within the terms of the *Lex Cornelia de Sicariis* (81 B.C.), and the castration of a slave, whether with or without his consent, was punishable by death.[5]

The Emperor Antoninus Pius (138-161 A.D.) declared the wilful killing of his own slave by a master to be homicide, subjecting the

[1] *Code*, ix. 14, 1; *C. Theod.* ix. 12, 1. The use of a deadly weapon was considered conclusive evidence of murderous intention.

[2] *Dig.* xviii. 1, 42; xlviii. 8, 11, 1-2. This law is identified by Karlowa (*Röm. Rechtsg.* i. 624) with a *Lex Junia Petronia* of A.D. 19, and Roby (*Roman Private Law*, i. 54) tentatively fixes that date. Some authorities ascribe this statute to 61 B.C. (*e.g.* Hunter, p. 158).

[3] *Dig.* xl. 8, 2; *Code*, vii. 6, 1, 3.

[4] Buckland, *The Roman Law of Slavery*, 37.

[5] *Dig.* xlviii. 8, 4, 2.

owner to the same liability under the *Lex Cornelia de Sicariis* as if he had killed the slave of another owner; but death that ensued from punishment for domestic offences not inflicted *dolo malo* and with an intention to kill did not fall within this provision of the law. Antoninus Pius also declared, by a rescript, that when masters were proved to have been guilty of extreme cruelty to their slaves these should be sold, under such conditions, however, as would prevent them ever again belonging to the same master.[1]

In the estimation of the Roman Law a slave was a "thing" (*res*), and, as an object of property, was subject to the same rules as were applied to the ownership, possession, or transfer of domestic animals, and could be alienated or transferred, as by sale, gift, bequest, or pledge, or in any mode competent to transfer the ownership or the possession of any other kind of movable property. But although the Roman Law never recognised that a slave as such was other than a thing, and never accorded to the slave any legal rights, as such, not being a *persona* in the sense in which that term was understood, and consequently not possessing *caput*, it yet recognised that the slave was a potential person in respect of the possession of reason, by which he was capable both of increasing his master's property by means of his intellectual powers and, in certain circumstances, as by manumission, of becoming a "person" and thereby acquiring *caput*.[2] Further, as a human being, a slave differed from both domestic animals and inanimate things in respect that he might acquire or be subject to natural obligations.[3]

As a slave was legally incapable, in the character of a thing (*res*), of possessing any rights of property, any property acquired by a slave, whether as the profits of his labour, or in other ways, belonged to the master. But although slaves could not acquire legal rights for themselves, they yet often filled posts of trust and responsibility in both public and private life, and ordinarily acted on behalf of their masters in commercial transactions; so that it was not uncommon, so early even as the time of Plautus (200 B.C.), and it subsequently became customary, for a master to allow his slave to retain and accumulate gifts, or profits of his labour, and such an accumulation was known as the slave's *peculium*, with regard to which he was permitted to act as if it was his own, and he might enter into all kinds of business transactions as if on his own account. But the *peculium* remained, nevertheless, the legal property of the master, who, legally, was the contracting party. The slave sued and was sued in the name of his master, who was

[1] *Dig.* i. 6, 1, 2; Justinian, *Inst.* i. 8, 2; Gaius, *Inst.* i. 53.

[2] See *ante*, p. 69, and *post*, "Manumission," p. 109.

[3] On "natural" obligations, see Part IV., *post*.

entitled to repudiate any transaction not authorised by him or by which he did not benefit; but the master was always liable to third parties to the extent of the *peculium*, and he was liable in full if the transaction had been entered into by his direction or he had benefited by it.[1] Under the Praetorian law a slave could contract, in respect of his *peculium*, so as to give third parties rights over it against his master, and there was developed under that law a series of actions which were available against a master in respect of transactions entered into by his slave, whether expressly by direction of his master, or on behalf of his master, or even without his master's consent.[2]

The *peculium* of a slave might consist of any kind of property, whether movable or immovable, corporeal or incoporeal, such as land, money, slaves' credits and investments, rights of action, inheritances, or legacies and such like.[3] The dress of the slave was included in the *peculium*, except such as was intended for special occasions, which was regarded as only lent to him.[4] An alienation by a slave of anything belonging to his *peculium* was invalid unless his master had granted him the unrestricted management, in which case he might competently make a loan of money, sell and pledge, pay debts, accept payments, take and tender on oath, novate obligations, etc., but he was yet not entitled, even in such circumstances, to make a present or undertake a gratuitous obligation for some one else, the principle of this rule being that a slave might make his master's position better, but not worse.[5]

A master was liable to third parties for civil damages or delicts (*delicta*)[6] done by his slave, just as if it had been done by an animal belonging to him and for which he was responsible, and he was liable to compensate a third person for an injury committed by his slave, a wrong done by a slave being regarded as one done by his master, and, similarly, one done to a slave being considered as done to his master.[7] A master might, however, escape liability when sued in a "noxal" action (*noxalis actio*) for damage (*damnum*) caused by his slave by

[1] See Justinian, *Inst.* iv. 7, 3, as to what constitutes a "benefit" to the master.

[2] Such actions at law were known as the actions *adjecticiae qualitatis*, and were based upon the equitable principle that "where the benefit is there ought the burden to lie" (*cf.* Paul, *Sent.* viii. 1). See upon the actions *adjecticiae qualitatis*, Justinian, *Inst.* iv. 7.

[3] Roby, *Roman Private Law*, i. 54 *et seq.* A slave might have as part of his *peculium* another slave owned by his master. Such latter slave was known as *vicarius;* and if a slave owed a debt to his *vicarius* it was considered as part, and was not deducted in estimating the amount of his *peculium* (Justinian, *Inst.* iv. 7, 4; Gaius, *Inst.* iv. 7, 3. *Cf.* Cuq, *Institutions Juridiques des Romains*, ii. 135).

[4] Roby, *ut supra.*

[5] *Dig.* l. 17, 133.

[6] See *post*, Part IV., "Obligations."

[7] Justinian, *Inst.* iv. 8, 5; Gaius, *Inst.* iv. 77.

giving up the slave to the injured person. Such "noxal surrender" was known as *noxae deditio*, and while freeing the master from liability it at the same time operated a transfer of all his rights to the person suing the noxal action. But if the slave could compensate the new master for the damage (*damnum*) done by him he was, under the Praetorian law, entitled to be manumitted, even against the will of the new master.[1] No action could be brought by a master against a slave for a wrongful act done by the slave against him, because no enforceable obligation could arise between a master and anyone in his power (*in potestate*); and no right of action subsequently arose if either the slave passed into the power of another master, or was manumitted.[2]

A master, although liable for civil damage (*damnum*) done by his slave, was not liable for crimes committed by him without his knowledge or connivance; in such cases the slave alone was liable to punishment.[3]

SECTION 23.—MANUMISSION

Manumission (*manumissio*) signified the granting of liberty to a slave.[4] It might be either voluntary or involuntary. "Voluntary" manumission was the deliberate freeing of a slave by the master; "involuntary" manumission was the grant of liberty to a slave by law, without the voluntary act of the master, by way either of punishment of the master or of reward to the slave.

(a) *Voluntary Manumission*

This form of manumission was either formal or informal. There were three modes of formal or "regular" manumission (*legitima manumissio*), which had their foundation in the Twelve Tables and the ancient *jus civile;* they pertain to the period of the Republic and are marked by the formalism and rigidity characteristic of the Roman Law in its earlier phases.

The formal or "regular" modes of manumission were those known as that (1) *per vindictam*, or "by the rod"; (2) *censu*, or "by the census roll"; and (3) *testamento*, or "by testament."

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[1] Justinian, *Inst.* iv. 8, 3.

[2] Justinian, *Inst.* iv. 8, 6; Gaius, *Inst.* iv. 78.

[3] See upon the general position of a Roman slave and upon the course of the legislation limiting the dominical authority, Buckland, *The Roman Law of Slavery*, 36 *et seq.*; Poste's *Gaius*, 4th ed., 73 *et seq.*; Moyle, *Institutes of Justinian*, 4th ed., 109, Commentary, s. 2; Roby, *Roman Private Law*, i. 53 *et seq.*; Roby, *Introduction to Justinian's Digest*, 128; Mackenzie, *Studies in Roman Law*, 88, 89; Cuq, *Institutions Juridiques des Romains*, i. 166-168, ii. 129-135; Girard, *Manuel de Droit Romain*, 89 *et seq.* (5th ed., 92 *et seq.*); May, *Éléments de Droit Civil*, 65 *et seq.*; Didier-Pailhé, *Droit Romain*, i. 12-15.

[4] Justinian, *Inst.* i. 5 pr.

Manumission *per vindictam* was a formal ceremony in the form of a fictitious suit or action at law [1] brought before one of the higher magistrates, such as a Consul, Praetor, Pro-Consul, or the Governor of a Province,[2] but most usually before the Praetor, in which one person styled the "asserter of freedom" (*adsertor libertatis*), who acted as the plaintiff in the fictitious action for freedom, claimed the slave from his master as being a free man, at the same time touching him on the head with a rod (*vindicta*) or wand (*festuca*); the master thereupon, having first turned the slave round, allowed him to go,[3] this step in the process being known as *missio manu* or "the sending away by the hand," and the magistrate then declared the slave to be free.[4]

The ceremony of manumission *per vindictam* was only competent to individuals, and not to corporations, as it was requisite that the master should appear in person to use the formal words and perform the formal acts; but the ceremony did not necessarily require to take place in Court.[5] By the time of Hermogenian (287 A.D.) a rigid adherence to the solemnities and formal words of the ceremony was no longer necessary; and by the time of Ulpian, who was slain in 228 A.D. during the reign and in the presence of the Emperor Alexander Severus, even the presence of the lictor was no longer essential.[6]

Manumission *censu* was effected by the master entering the name of his slave on the list (*census*) of Roman citizens that was prepared every five years. This mode of manumission became obsolete during the Empire.[7]

Manumission *testamento* was operated by a master bequeathing the gift of liberty to his slave in his testament or last will. A bequest of liberty might be either conditional or unconditional. An unconditional bequest of liberty only took effect when the heir had entered upon the inheritance,[8] and was revocable so long as the testator lived. A conditional bequest of liberty took effect only upon the fulfilment of the condition, until which time the slave was called a *statuliber*;[9] a slave was also called *statuliber* who was to obtain his freedom on the expiry of a certain period after the death of the testator.[10]

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[1] Called *causa liberalis* (*Dig.* xl. 12).

[2] *Code*, vii. 1, 4.

[3] Livy, xxxiv. 16.

[4] The part of *adsertor libertatis* was taken by the lictor, and the ceremony is supposed to have derived its name from the use made of the lictor's *vindicta* or rod.

[5] Justinian, *Inst.* i. 5, 2; Gaius, *Inst.* i. 20.

[6] *Dig.* xl. 2, 23; xl. 2, 8.

[7] Ulpian, *Frag.* i. 7. After the reign of Vespasian (69-79 A.D.) no census was prepared throughout a period of 180 years; and the last census was made up by Decius in 249 A.D.

[8] Ulpian, *Frag.* i. 22; *Dig.* xl. 4, 43.

[9] Ulpian, *Frag.* ii. 2; *Dig.* xl. 7, 1.

[10] *Dig.* xl. 7, 1 pr.

A bequest of liberty to a slave might be either direct or indirect. A bequest was direct when the testator declared that the slave was to be free, and the slave became free as soon as the heir entered upon the inheritance; a bequest was indirect when the gift of liberty was given through the medium of a trust (*fideicommissum*) and the testator directed a trustee (*fideicommissarius*)—usually the heir or a legatee—to manumit the slave.[1] In the case of an indirect bequest of freedom the slave did not acquire his freedom until the "fidei commissary" or trustee had performed the trust imposed upon him and had manumitted the slave.[2]

A slave who had been manumitted directly "by testament" became thereby the freedman of the testator, and, as such, was styled *orcinus*;[3] but a slave manumitted indirectly through the medium of a trust (*fidei commissum*) became the freedman of the person who actually manumitted him.[4]

The three "regular" modes of manumission (*legitima manumissio*) being founded upon the ancient *jus civile* and the Twelve Tables, were essentially formal and solemn in their character, and they had, moreover, the effect of at once freeing the slave and of investing him with the full rights of Roman citizenship.[5]

These modes pertain to the period of the Republic, and possessed a public character, the State being represented by the Praetor and the Censor, and the Lictor in the case of manumission *per vindictam* and *censu*; manumission *testamento* was also regarded as a public act, for the Roman testament originally possessed, in theory, a public character, and took the form of a law (*lex*) passed publicly in the *Comitia Curiata*. It was on account of the State being so represented in the proceedings as a consenting party that such manumissions were styled *legitima* or *justa manumissio*, and are frequently referred to as "public" manumission.

In the course of the Imperial Period a number of less formal and public modes of manumission came to be recognised by usage, or by the Praetor, or expressly by Imperial enactment, which, however, while conferring freedom upon the slave did not necessarily invest him at the same time with full rights of citizenship, until the time of Justinian, when, as the result of his legislation, the distinction between formal and informal manumission disappeared.[6]

Informal modes of manumission were such as those effected (a) *inter amicos* or "amongst friends," (b) *per epistolam* or "by a letter," (c) *in*

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[1] Justinian, *Inst.* ii. 24, 2; Gaius, *Inst.* ii. 249, 263-267.

[2] Justinian, *Inst.* ii. 24, 2; Gaius, *Inst.* ii. 263-267; *Code*, vii. 4, 6, 7.

[3] This word is derived from *orcus*, meaning a "shade," and was applied to signify that he was the freedman of a person who was dead, and was amongst the "shades," or spirits.

[4] Justinian, *Inst.* ii. 24, 2; Gaius, *Inst.* ii. 263-267; *Code*, vii. 4, 6, 7.

[5] Gaius, *Inst.* i. 17. Cf. Poste, *Gaius*, 26.

[6] *Dig.* xl.

ecclesiis or "in church," (d) by a bequest of "the cap of liberty" (*pileus*), (e) by adoption, (f) by delivery of title, or (g) by giving a dowry to a female slave.[1]

In the time of Justinian any clearly expressed intention, however informal, was considered sufficient to constitute a grant of liberty.[2]

Manumission *inter amicos* was a private and informal form of manumission that was in use even during the period of the Republic, and took the form of a verbal declaration by the master in the company of his friends (*inter amicos*) of his intention that the slave should be free. Justinian required that the declaration should be in the presence of not less than five witnesses, and that it should be subsequently put into writing and attested.[3]

Manumission *per epistolam* was effected by a letter from the master to the slave expressing his intention to free him; it required, in the time of Justinian, to be witnessed by five persons.[4]

Manumission *in ecclesiis* or "in church" took the form of a declaration by the master in the presence of the bishop, and usually at one or other of the principal religious festivals; and the master's declaration was subsequently reduced to writing.[5] This form of manumission was in use before the reign of Constantine.[6]

Manumission by a bequest of the "cap of liberty" (*pileus*) was operated when a slave was permitted to wear "the cap of liberty" at the funeral of his master by the authority of either the deceased or his heir. This form of implied manumission was introduced by express enactment to check the practice of slaves who had not been manumitted *testamento* appearing at the funeral wearing the *pileus* in order to give a false impression of the humanity and generosity of the deceased.

Manumission was also effected by the public adoption of his slave by a master; but such adoption, although it gave the name, did not confer the rights of a son upon the slave.[7] By such adoption the slave did not acquire the status of an *ingenuus*, and, as such, a free-born member of the adopter's family, but only that of a freedman.[8]

Manumission, further, took place if the master, intending to give him his liberty, handed over to the slave the title-deeds in respect of which he owned him, or destroyed them in the presence of five witnesses.[9]

Manumission was impliedly effected, without the necessity of a formal declaration when a female slave was given by her master in marriage to a free man, and at the same time received from him a dowry conveyed by a written deed.[10]

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[1] Justinian, *Inst.* i. 5, 1. *Dig.* xl.; *Code*, i. 13; vii. 6.
[2] Cf. *Code*, vii. 7, 3, 2.
[3] *Code*, vii. 6, 2.
[4] *Code*, vii. 6, 1. See also *Code*, vi. 36, 8, 3.
[5] *Code*, i. 13, 1-2.
[6] *Code*, i. 13.
[7] Justinian, *Inst.* i. 11, 12.
[8] Cf. *Dig.* i. 7, 46.
[9] *Code*, vii. 6, 11.
[10] *Code*, vii. 6, 9.

(b) *Involuntary Manumission*

There were circumstances in respect of which a slave might become free by mere operation of law, without the necessity of manumission by his master, either by way of a forfeiture on the part of the master, or as a reward to the slave for acts specially so recognised by the law. Thus the Emperor Claudius declared that a sick slave who had been abandoned by his master and subsequently recovered should be free;[1] and Justinian extended this to the case of the exposure of an infant slave;[2] the Emperor Constantine rewarded with liberty slaves whose evidence procured the conviction of counterfeit coiners;[3] so also a slave who disclosed the murderer of his master obtained freedom;[4] Constantine also gave freedom to slaves who disclosed a rape that had been concealed or compromised;[5] the former master of a female slave who had sold her on condition that she should not be made a prostitute could demand her freedom if this condition was broken,[6] and this provision of the law was afterwards extended to every case in which a female slave was made a prostitute against her will;[7] a master forfeited his rights in a female slave, who thereby became free, if he wilfully and maliciously allowed a freeman to marry her in error.[8]

SECTION 24.—EFFECTS OF MANUMISSION

"Regular" or formal manumission (*legitima manumissio*) had the effect of at once investing the slave with both liberty and the full rights of Roman citizenship, but, for long, "irregular" or informal manumission, although recognised and protected by the Praetor, was not legally valid, so that even if a master had, in his lifetime, treated the slave as if he were a freedman, yet, on his death, the master's heir was entitled to claim the freedman as his slave. The Praetor protected the informally manumitted slave by allowing him to retain his personal freedom, but he did not confer upon him any proprietary rights, so that the master continued entitled to claim the slave's property on his death.[9]

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[1] *Dig.* xl. 8, 2.

[2] *Code*, i. 4, 23; *Nov.* 153.

[3] *Code*, vii. 13, 2.

[4] *Dig.* xl. 8, 5; *Code*, vii. 13, 1. A slave who obtained his freedom in this way was regarded as the freedman of his dead master.

[5] *Code*, vii. 13, 3.

[6] *Dig.* xl. 8, 7.

[7] *Code*, i. 4, 12; i. 4, 14.

[8] *Nov.* 22, 11.

[9] A slave in such circumstances was said to be *praetoris tuitione liber.*

SECTION 25.—RESTRAINTS ON MANUMISSION

During the Empire certain restrictions were placed upon the right of manumission by masters with a view to check or limit the numbers of freed slaves with which the State was being overrun, and who were constituting a serious social and political danger. The chief statutes restricting the freedom of manumission were the *Lex Aelia Sentia* (A.D. 4), and the *Lex Junia Norbana*,[1] by both of which informally manumitted slaves acquired, on manumission, only limited rights, and not the full rights of Roman citizenship, and the *Lex Fufia Caninia*[2] (A.D. 8), which limited the number of slaves who might be manumitted by will (*testamento*).

The Emperor Justinian repealed all such legislative restrictions upon the right of manumission, except one contained in the *Lex Aelia Sentia* with reference to manumission in fraud of creditors; and in the time of Justinian it was immaterial whether a slave had been "regularly" or "irregularly" manumitted so far as regarded the legal effects of manumission, which latter immediately conferred full rights of citizenship; and Justinian further abolished all distinctions between different classes of freedmen.

The *Lex Aelia Sentia* (A.D. 4) enacted that in order that a manumission should be complete to the effect of conferring full Roman citizenship, the master should have attained twenty and the slave thirty years of age; but a master under twenty years might yet manumit, and a slave under thirty be yet manumitted[3] if there was obtained the approval of a special Board or Council (*Consilium*) which was constituted for that purpose,[4] after adducing reasons considered by the Board to be good and sufficient:[5] even then, however, such manumission, to be valid, required to be *per vindictam*.[6] Good grounds for such manumission were such as that the person to be manumitted was the father or mother of the manumittor, or his son or his daughter, or his brother or sister, his preceptor (*paedagogus*), foster-father, or foster-child of either sex, or his foster-brother; or that the slave was about to be made the agent (*procurator*) of the manumittor, or that being a female he was about to marry her.[7] The *Lex Aelia Sentia* further ranked as *dediticii* or enemies who had surrendered at discretion, and as such possessing no rights

[1] See *post*, pp. 115, 116.

[2] Justinian, *Inst.* i. 7; Gaius, *Inst.* i. 42-46. This statute was usually styled the *Lex Furia Caninia* before the re-examination of the MSS. of Gaius by Studemund.

[3] Gaius, *Inst.* i. 18.

[4] Gaius, *Inst.* i. 20. This Board consisted, in Rome, of five senators and five knights (*equites*), and in the provinces, of twenty *recuperatores* who were Roman citizens (see Poste's *Gaius*, p. 25; Commentary, s. 20).

[5] Gaius, *Inst.* i. 18, 19; i. 39; Justinian, *Inst.* i. 6, 6.

[6] Justinian, *Inst.* i. 6, 4.

[7] Justinian, *Inst.* i. 6, 5; Gaius, *Inst.* i. 19; i. 39.

except such as might be conceded to them *ex gratia*, slaves who had been guilty before manumission of serious crimes (*flagitia*), or who had been degradingly punished for misconduct, and it imposed upon them perpetual disabilities.[1] This statute, moreover, forbade manumission in fraud of creditors.[2] Creditors were such persons as had a right of action against the manumittor,[3] and in order to constitute a fraud it was requisite that the manumittor should be either insolvent at the time of the manumission, or become insolvent as the result, and have, at the same time, a fraudulent intention[4] (*consilium*).

Justinian repealed the provisions of the *Lex Aelia Sentia* with the exception of those relating to manumission in fraud of creditors, and he reduced the age at which a minor was entitled to manumit to seventeen,[5] in the first instance, and subsequently to fourteen years.[6]

The *Lex Junia Norbana*, the exact date of which may be regarded as uncertain,[7] but probably attributable to the reign of Augustus before the *Lex Aelia Sentia*,[8] gave to slaves who had been informally or defectively manumitted, the status of "Junian Latins" (*Latini Juniani*) in respect of which they were put on the same footing as Latin colonists (*Latini coloniarii*) or citizens of a Roman colony in Latium; they possessed *commercium* in respect of which they might hold property on a quiritary title, could acquire and alienate property in the modes of the *Jus civile* by usucapion, mancipation, and *in jure cessio*, could enter into valid obligations, and could enforce their rights by action like any Roman citizen; but they had not the right of *connubium*, and consequently could not contract a "civil" or regular marriage, or acquire *potestas* over their children, and they were incapable of "civil" relationship by the tie of "agnation"; nor had they the *suffragium* or right of voting at elections or of holding public offices, and they were incapable of making or of taking directly as heirs or legatees, or of acting as guardians under a will, but they might take indirectly as beneficiaries under a trust[9] (*fidei commissum*); moreover, upon their death their property reverted to their manumittors as if they had been still slaves.[10]

There were various modes by which Junian Latins, and also

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[1] Gaius, *Inst.* i. 13, 14.

[2] Justinian, *Inst.* i. 6 pr.; Gaius, *Inst.* i. 37.

[3] *Dig.* xl. 9, 16, 2.

[4] Justinian, *Inst.* i. 6, 3; *Dig.* xl. 9, 10; xlii. 8, 15.

[5] Justinian, *Inst.* i. 6, 7; Gaius, *Inst.* i. 40.

[6] *Nov.* 119, 2.

[7] Poste, *Gaius*, p. 26.

[8] Roby, *Roman Private Law*, i. 38. The *Lex Junia Norbana* is so called by Justinian (*Inst.* i. 5, 3), but both Gaius and Ulpian refer to it merely as *Lex Junia*. It has hitherto been generally ascribed to A.D. 19, in the reign of Tiberius, when L. Norbanus Balbus was one of the Consuls, but it is now thought to have been earlier than the *Lex Aelia Sentia* (A.D. 4). Gaius states (i. 29) that slaves manumitted under thirty became Latins under the *Lex Aelia Sentia*, which would, if accurate, ascribe the *Lex Junia* to a date anterior to the former statute. Mommsen ascribes the *Lex Junia* to the end of the Republic (*Staatsr.* iii. 626). Girard (*Droit Romain*, p. 120) puts it between 710 and 727 A.U.C.

[9] Gaius, *Inst.* i. 24.

[10] *Cf.* Justinian, *Inst.* iii. 7, 4.

peregrins, might convert their status into full Roman citizenship,[1] the object of the provision of such means being to encourage either marriage or certain occupations of State utility.[2] Thus a Latin freedman who had been manumitted under thirty might become Roman citizens under a special provision of the *Lex Aelia Sentia* by proving before a magistrate his marriage with a Roman or Latin wife, or a person whom he believed to be a Roman or Latin, and the birth of a son who was by then a year old;[3] by holding a magistracy in a Latin colony;[4] by *iteratio* or re-manumission in the forms requisite to constitute regular manumission;[5] by Imperial grant (*beneficium principale*);[6] or by *erroris causa probatio*, or proof of mistake, in cases where a Roman citizen had married a female Latin or peregrin believing her to be a Roman citizen; or a Latin had married a female peregrin, believing her to be either a citizen or a Latin; or a female Latin had married a male peregrin under the belief that he was a Latin; or a citizen, thinking himself to be a Latin or a peregrin, married a female Latin; or a female citizen married a male peregrin, thinking him to be a citizen or a Latin.[7] Full citizenship might also be obtained by Latins in respect of certain occupations, as by special military service, under the Visellian law;[8] by building a sea-going ship of a certain capacity and using it for importing corn to Rome during six years, under the terms of an Edict of Claudius;[9] by expending a certain amount of money on the erection of a house at Rome;[10] or, under a constitution of Trajan, by carrying on the business of a miller in Rome for three years and grinding a certain amount of wheat each day.[11]

Justinian repealed both the *Lex Junia Norbana* and the *Lex Fufia Caninia*, and abolished the status of Junian Latinity, and all distinctions between classes of freedmen. Under Justinian's legislation a slave acquired full citizenship at once by manumission in any way sufficiently indicating an intention on the part of his owner to make him free.[12]

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[1] Gaius, *Inst.* i. 28-35.

[2] Roby, *Roman Private Law*, i. 38.

[3] Gaius, *Inst.* i. 29, 80; Ulpian, iii. 3. This provision of the *Lex Aelia Sentia* was extended to all freedmen who acquired the status of Latins, even though they were already thirty when manumitted (Gaius, *Inst.* i. 31) by a S.-C. passed during the consulship of Pegasus and Pusius in the reign of Vespasian (Justinian, *Inst.* ii. 23, 5). It was essential that the child should have completed his first year, and this mode of acquiring citizenship was consequently sometimes known as *anniculi probatio*.

[4] Gaius, *Inst.* i. 95, 96.

[5] Gaius, *Inst.* i. 35; Ulpian, iii. 2.

[6] Gaius, *Inst.* iii. 72, 73; Ulpian, iii. 2.

[7] Gaius, *Inst.* i. 67-71.

[8] Gaius, *Inst.* i. 32*b*. The Visellian law is supposed to have been passed in A.D. 24, during the consulship of Lucius Visellius Varro and S. Cornelius Cethegus.

[9] Gaius, *Inst.* i. 32*c*.

[10] Gaius, *Inst.* i. 33.

[11] Gaius, *Inst.* i. 34. See upon the modes by which Latinity might be converted into full citizenship, Roby, *Roman Private Law*, i. 38-41; Hunter, *Roman Law*, 673, 674; Poste, *Institutes of Gaius*, Commentary, pp. 31, 32; Girard, *Manuel de Droit Romain*, pp. 120-122.

[12] Justinian, *Inst.* iii. 7, 4. See, on manumission generally, Buckland, *Roman Law of Slavery*, Appendices iv. and v.; Poste, *Institutes of Gaius*, 4th ed., pp. 23-35;

SECTION 26.—RELATION OF THE FREEDMAN (LIBERTUS OR LIBERTINUS) TO HIS PATRON—JUS PATRONATUS

Freedmen were defined by Justinian as those who had been manumitted from legal servitude.[1]

After manumission a master continued to retain certain rights over his former slave, who was thereafter known as his freedman or *libertinus*.

The freedman required to show a certain amount of gratitude and respect towards his patron; he became practically a member of his patron's family, and usually assumed his patron's family name.

The freedman and the patron owed each other reciprocal duties of assistance and protection.

Although Justinian abolished, as has been already mentioned,[2] all distinctions between different classes of freedmen such as "Junian Latins" created by the *Lex Junia Norbana*, and *dediticii* created by the *Lex Aelia Sentia*, and placed all freedmen, on manumission, in the position of freeborn citizens (*ingenui*), he, nevertheless, retained the rights of the patron over his freedman, which were signified by the term *jus patronatus*; it was, indeed, the duties which a freedman legally owed to his former master which in fact distinguished him from a freeborn citizen.

The obligations owed by a freedman towards his patron, and which were involved in the term *jus patronatus*, extended to the children of the freedman, and descended on the patron's death to the latter's children. In respect of these obligations the freedman required to show reasonable gratitude and respect[3] (*obsequium*, *reverentia*) towards his patron, and he must neither say nor do anything likely to injure his patron in person, property, or reputation. If the patron, on the other hand, failed in his reciprocal duty of support and protection towards his freedman he lost his rights of patronage (*jus patronatus*) in respect of which he would forfeit his right to the freedman's services (*operae*) and to his property (*bona*).

The duties of the freedman towards his patron were summed up in the three terms *obsequium*, *operae*, and *bona*.

In respect of *obsequium* the freedman was bound to treat his patron with due respect, as a child his parent, and he was not permitted

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Hunter, *Roman Law*, 171-183; Roby, *Roman Private Law*, i. 25 *et seq.*, i. 36 *et seq.*; Muirhead, *Roman Law*, 2nd ed., pp. 315-319, 391; Sohm, *Institutes of Roman Law*, 3rd ed., 167 *et seq.*; Cuq, *Institutions Juridiques des Romains*, ii. 136-141; Girard, *Manuel de Droit Romain*, *voce* "Affranchisement."

[1] Justinian, *Inst.* i. 5 pr.

[2] *Supra*, pp. 114, 116.

[3] *Dig.* xxxvii. 15.

to sue his patron without the previous consent of the Praetor,[1] which would not be accorded if the result of the action would be to brand the patron with infamy.[2] The freedman was also bound to assist or support his patron, so far as he was able, if the patron or his family became indigent,[3] and a corresponding obligation was upon the patron. If a freedman brought an action against his patron without previously obtaining the leave of the Praetor, or in any other way failed to show that degree of respect and gratitude involved in the term *obsequium*, he would be guilty of "ingratitude" (*ingratus*) which might even involve his being reduced once more to slavery, if the ingratitude was considered to be sufficiently gross.[4]

In respect of *operae* the freedman was morally bound to perform certain services (*operae officiales*) for his patron. This obligation was usually made effectually binding by the freedman, immediately after manumission, promising on oath.[5] The freedman usually worked for his patron for a certain portion of each day,[6] at either the same kind of work that he had been accustomed to perform when a slave, or any trade or art that he might have subsequently learned;[7] and the amount of work performed, if not specially agreed upon, was determined by circumstances such as the age, health, or position of the parties respectively.[8] If the patron did not provide maintenance for his freedman when performing the services he owed, he was bound to allow him sufficient time in which to earn enough for his own maintenance.[9] Moreover, the work to be done by the freedman was personal to the patron, and could not be let by the patron to any third person.[10] Further, this obligation of *operae* could only be created when the manumission had been voluntary and gratuitous on the part of the master.[11]

In respect of *bona*, the patron had certain rights of succession to the property (*jura in bonis*) of his freedman on the latter's death. If the freedman died intestate and childless, the patron was entitled

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[1] *Dig.* ii. 4, 4, 1.

[2] *Dig.* xxxvii. 15, 5, 1; 15, 2 pr.; 15, 7, 2. On "Infamia," see *ante*, Chapter II., section 3.

[3] *Dig.* xxv. 3, 9; xxv. 3, 5, 19.

[4] *Dig.* xxxvii. 14, 5 pr.; xxv. 3, 6, 1; xxxvii. 14, 1; iv. 2, 21 pr.; *Code*, vi. 7, 2; vii. 16, 30.

[5] *Jurata promissio liberti.*

[6] *Dig.* xxxviii. 1, 1.

[7] *Dig.* xxxviii. 1, 38 pr.

[8] *Dig.* xxxviii. 1, 30, pr; 1, 16, 1.

[9] *Dig.* xxxviii. 1, 19; 1, 22, 2.

[10] *Dig.* xii. 6, 26, 12; 38, 1, 25, 1.

[11] *Dig.* xxxviii. 1, 13 pr.; *Code*, vi. 3, 7.

to the whole succession; and if he died testate but childless the patron was entitled to one-third of the inheritance if it exceeded one hundred *aurei* or one hundred thousand *sestertii*.[1]

This right of the patron to the succession of his freedman was the most important element in the *jus patronatus*.

SECTION 27.—COLONI

Before passing from the subject of slavery, it is necessary to mention a class of agriculturists known generally as *Coloni*,[2] who existed during the later Roman Empire, and who occupied a position midway between that of freemen and slaves. They were settled upon and cultivated the land where they were born, nominally as tenants of the landowners, paying a rent, usually fixed by custom,[3] and in kind.[4] The *colonus* was classed by the law as *ingenuus* or freeborn, and in this respect he was distinguished from a slave; but he was in fact a slave or a serf, for he was *glebae ascriptus*, or "attached to the soil," and was regarded as so much a part of the land as to be unable to leave it, or to be ejected from it, or sold apart from it;[5] and if he left the land on which he was settled he could be recovered by a "real" action.

There were two classes of *Coloni*, namely, *Coloni liberi* and *adscriptitii*. The first class, *Coloni liberi* or "free colonists," were also known as *inquilini* or *tributarii;* apart from being bound to the land, they enjoyed personal freedom and could acquire rights of property as against the owner of the land, and were not subject to burdens beyond the payment of the fixed rent.[6] The second class of *coloni* was known as *adscriptitii* or *censiti;* they were incapable of proprietary rights; anything acquired by them was regarded merely as *peculium*, and as being *de jure* the property of the owner of the land; the only respect, in fact, in which the position of *adscriptitii* differed from that of slaves was with regard to the fixity of their tenure.

The *colonus*[7] was, during the first three centuries of the Empire, a free tenant, but during the third century of the Empire the relation

[1] Justinian, *Inst.* iii. 7, 3.

[2] They were also sometimes called *rustici* or *agricolae*.

[3] *Code*, xi. 49, 1.

[4] *Code*, xi. 47, 5.

[5] *C. Theod.* xiii. 10, 3.

[6] *Code*, xi. 48, 1.

[7] The terms *colonus* and *inquilinus* were also used, in an altogether different sense from that employed here, to signify a free person who was the lessee of land—*e.g.* a farm—and of a house respectively (*cf.* Roby, *Roman Private Law*, ii. 171).

between the landowner and the tenant became a hereditary one owing to the economic necessity for the labour of the *colonus;* the attachment of the *colonus* to the soil was during the third century only *de facto,* but it became also *de jure* during the fourth century of the Empire. The *coloni* were the villeins of the later Empire, and bear a close resemblance to the serfs of later times.[1]

The system of the Colonate was still in full force under Justinian, although no mention is made of it in the *Institutes,* and it continued to exist in the West during several centuries after the overthrow of the Roman rule.[2]

[1] Sohm, *Institutes of Roman Law,* 3rd ed., 172.

[2] See on "Coloni," Muirhead, *History of Roman Law,* 2nd ed., 358-360; Hunter, *Roman Law,* 162; Sohm, *ut supra*; Girard, *Manuel de Droit Romain,* 127, 128; May, *Éléments de Droit Romain,* 76.

CHAPTER VI

The Roman Family Organisation

Section 28.—Familia—Agnates—Cognates

The third element in the legal status or *caput* of a Roman citizen, in addition to liberty (*libertas*) and citizenship (*civitas*) was family (*familia*) or membership of a Roman family, which implied the possession and enjoyment of peculiar family rights having their foundation in the ancient law of the Romans—the early *jus civile*.

The term *familia* had a number of meanings;[1] in its most limited sense it was used to signify merely a household consisting of its head (*paterfamilias*) and all those persons in it, wife and children, who were directly and actually subject to his *potestas* or family authority. In a wider sense the term *familia* was employed to signify the whole "agnatic" connection, or all those persons who were in law regarded as related to each other, either because they were under the *potestas* of a common living male ancestor, or because they would have been under the same *potestas* if the common male ancestor had been still alive.[2] Such persons were said to be "agnates" (*agnati*), related to each other by the legal tie of "agnation."

> Agnation was thus a relationship based upon the fact of subjection to the authority of the *paterfamilias* or head of the family,[3] and traceable only through males, because they alone were capable of possessing and exercising the paternal authority known as *patria potestas*.
>
> Agnation was, moreover, an artificial and purely legal relationship, for persons might be agnates to each other, by such artificial means as adoption, between whom there was no natural relationship by blood; and they might also cease to be agnates and members of the same "agnatic" family by such artificial means as emancipation, although naturally related to each other by blood or "cognation."

The "cognatic," in contradistinction to the "agnatic," family signified all those persons who were naturally related to each other by blood; and "cognation," as contrasted with "agnation," was relation-

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[1] *Cf.* Ortolan, *History of Roman Law*, 471.
[2] *Cf.* Maine, *Ancient Law*, 1906, 154.
[3] *Cf.* Maine, *ut supra*.

ship by blood or natural relationship; while "cognates" (*cognati*), as opposed to agnates (*agnati*), were all those persons who traced their descent from a common ancestor of either sex.

Justinian defines "agnates" as those cognates who are related through males, that is, who are cognates through the father;[1] but this definition is defective, because it is not sufficiently inclusive, taking no account, as it does, of those persons who, not being cognates or natural relations by blood, had been brought into the family by such artificial means as adoption. "Agnates" were, in fact, of two kinds; the term comprised (1) persons who were "cognates," or natural blood relations, tracing their relationship, however, only through males,[2] and excluding any such blood relations as had left the family by reason of emancipation, or marriage, or otherwise, and (2) persons who, not being natural blood relations, had become members of the agnatic family by artificial means, such as adoption.[3]

Under the ancient civil law of Rome it was the artificial legal tie of agnation that alone conferred family rights and rights of succession. In later Roman times, under Praetorian influence, cognation or blood relationship came to be legally recognised, and the law of intestate succession was entirely transformed by Justinian[4] by the recognition of cognation as the basis of family relationship and of inheritance in place of the purely artificial tie of agnation created by the fact of subjection to a common authority (*potestas*), and subsisting only so long as that authority continued; and the law of guardianship was, moreover, modified to the effect that only cognatic relationship was thereafter to constitute a title to *tutela legitima*.[5]

But until cognation was thus legally recognised, a man's *legal* relations were his agnates, who might or might not happen to be, at the same time, his own natural or blood relatives.

The term *familia* was also sometimes used in a sense more general than that of either merely the household, or the whole agnatic connection, to include everyone *in mancipio* of the *paterfamilias*, but not related to him; and it was sometimes employed in a special general sense to include all the family property,[6] as well as all the persons

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[1] Justinian, *Inst.* iii. 2, 1; *cf.* Gaius, *Inst.* i. 156; iii. 10. See also for a definition of agnates as "persons related to one another . . . through their male ascendants," Justinian, *Inst.* i. 15, 1.

[2] Hence the legal maxim, *Mulier familiae suae et caput, et finis est* (*Dig.* l. 16, 195, 5).

[3] See on Agnation and Cognation, Moyle, *Institutes of Roman Law*, 4th ed., 154; Poste, *Institutes of Gaius*, 4th ed., 92, 273; Mackenzie, *Roman Law*, 141; Hunter, *Roman Law*, 836; Sohm, *Institutes of Roman Law*, 449, 450; Cuq, *Institutions Juridiques des Romains*, i. 197.

[4] *Nov.* 118, 4; 5.

[5] See *post*, Section 54 (*b*), p. 177.

[6] *Cf.* Ortolan, *History of Roman Law*, 471

in the family who were subject to the authority of its head, and within the term "property" (*bona*) slaves were comprised.

The Roman family was from earliest times and for very long a complete and independent organisation, and was the unit of the Roman social organisation. The private law of Rome was based upon the idea that each family had a head. The head of the family was the eldest living male ancestor, and he, in the capacity of *paterfamilias*, exercised paternal authority (*patria potestas*) over all his descendants, whether natural or legal (*i.e.* artificial), through males.[1] The *paterfamilias* was not only the head of the family, but he was actually its ruler; and he exercised supreme authority and judicial powers over all its members. Within the family circle the authority (*patria potestas*) of the Roman *paterfamilias* over his dependants was originally absolute, even to the extent of life and death; he had the right to determine who should be members of the family; he could refuse to recognise or admit to the family a child, even though lawfully borne to him by his wife; he might, in his absolute discretion, expel members from the family; and he could even sell his son into slavery; no members of the family could own any property without his consent, or marry without his permission. As a member of the household the wife's position was legally assimilated to that of a daughter of her husband, and she was, in other words, *in loco filiae*.

The *paterfamilias* was also the high priest of the family, and he regulated and conducted the *sacra* or religious rites which were special and peculiar to each Roman family.[2]

SECTION 29.—PATRIA POTESTAS

This term signified the legal rights and authority which the head of a Roman family possessed over the persons and the property of his legitimate children and other descendants[3] who were then said to be *in potestate* or under his power (*potestas*). The power of the head of a Roman family over his children and other descendants was peculiar to Roman citizens alone,[4] and was an extension to an extreme and

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[1] See further on *Patria Potestas* and the course of its restriction, Sections 29 and 30.

[2] See on the Roman family organisation generally, Muirhead, *Roman Law*, 2nd ed., pp. 24-36; Sohm, *Institutes of Roman Law*, 3rd ed., p. 448 *et seq.*; Roby, *Roman Private Law*, i. 52 *et seq.* (bk. ii.); Girard, *Manuel de Droit Romain*, bk. ii., ch. iii.; Cuq, *Institutions Juridiques des Romains*, i. 152-204 (bk. ii., ch. iv.).

[3] Justinian, *Inst.* i. 9 pr.; cf. *Dig.* l. 16, 215.

[4] Justinian, *Inst.* i. 9, 2; Gaius, *Inst.* i. 55.

unnatural degree of the natural duty of a parent to rear, protect, and guide his children until they are of an age and capacity to look after themselves and to manage their own affairs. The *patria potestas* exercised by a Roman *paterfamilias* over his descendants originally differed little, within the sphere of private law, from the *dominica potestas* or the authority possessed by a Roman master over his slave; there was, however, this distinction, that the *filiusfamilias* was always recognised as a "person" (*persona*). Within the region of public law, however, and as regards public rights and duties, the distinction between *paterfamilias* and *filiusfamilias* was unimportant, for the *patria potestas* had no relation to public matters in respect of all which the *filiusfamilias* was as free and independent as his *paterfamilias*.[1]

SECTION 30.—HOW PATRIA POTESTAS WAS CREATED

Patria potestas was the direct legal result of *justae nuptiae*, or regular marriage according to the peculiar forms of the old *jus civile*, and the birth of children following thereon;[2] but it might also arise by adoption,[3] or by legitimation, or by a process analogous to legitimation and equivalent to it in effect.[4]

In order that a Roman father should acquire *patria potestas* or "paternal power" it was essential that he should be both a Roman citizen and *sui juris*, or independent of any paternal authority himself at the time of the birth of his children. All those persons who were subject to *potestas* were said to be *alieni juris*. The *paterfamilias* was thus the only person in the family who, in respect of matters falling within the sphere and cognisance of private law, was *sui juris* or legally independent of family authority.

> The family, in the general sense, as has been already indicated,[5] comprised all those persons who were under the *potestas* or "power" of the *paterfamilias* whether by birth, adoption, or legitimation; and the *patria potestas* extended over not only the wife in her character as member of the household, and sons who had not been emancipated or freed from the *potestas*, or been adopted into other families, or ceased to be Roman citizens by *capitis deminutio* or otherwise, and daughters who had not become members of other families by either marriage or adoption, or become "vestal virgins," but also the wives and children of sons who were themselves married.
>
> The daughter of a *paterfamilias* came under the power of her

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[1] Cf. *Dig.* i. 6, 9; xxxvi. 1, 14; v. 1, 77, 78; i. 7, 3.

[2] Justinian, *Inst.* i. 9 pr.

[3] Justinian, *Inst.* i. 11; see "Adoption," *post*, Section 33, p. 132 *et seq.*

[4] Justinian, *Inst.* i. 10, 13; see "Legitimation," *post*, Section 36, p. 138.

[5] *Ante*, pp. 121, 122.

husband on her marriage, if he himself was *sui juris* or legally independent, and was placed by law in the position of his daughter (*in loco filiae*); but if her husband was himself *alieni juris* or subject to the *potestas* of some other person she passed, by virtue of her marriage, under the *potestas* of her husband's father or other ascendant to whose family authority (*patria potestas*) he himself was subject.

The *patria potestas* possessed a twofold character, for it extended over (1) the person, and (2) the property of those who were subject to it.

As regards the *person*, the *paterfamilias* originally possessed, by the law of the Twelve Tables, the *jus vitae necisque*, or an absolute power of life and death over those who were subject to his *potestas*,[1] but this extreme power was generally curtailed and restrained by law, during the Republican Period by the Censors, and subsequently by Imperial legislation, so that under the later Empire the power of the *paterfamilias* represented no more than a right to appeal to the magistrate for a remedy in cases of serious domestic offences.[2] The Emperor Alexander Severus limited the right of the father to ordinary simple chastisement, and for more severe punishment it was necessary to have magisterial sanction.[3] The Emperor Trajan insisted on the emancipation of a son on the ground of gross cruelty towards him on the part of his father,[4] and the Emperor Hadrian deported a father for slaying his son even when discovered in adultery with his stepmother.[5] The Emperor Constantine finally declared in 318 A.D. that the *paterfamilias* who slew his son was guilty of murder and should suffer death as a parricide.[6]

The Twelve Tables permitted the sale or pledge of children in the exercise of the *potestas*, but provided that a son should become free from the paternal power after a third sale by his father.[7] The Emperors Diocletian and Maximian in A.D. 294 declared the sale, gift, or pledge of a child to be unlawful;[8] the Emperor Constantine modified

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[1] *Code*, viii. 47, 10.

[2] *Code*, viii. 47, 3.

[3] *Code, ut supra; Dig.* xlviii. 8, 2.

[4] *Dig.* xxxvii. 12, 5.

[5] *Dig.* xlviii. 9, 5.

[6] *Code*, ix. 17, 1. The special penalty attached to the crime of parricide was that of being tied up in a sack, along with a cock, a viper, and an ape, and then thrown into the sea or a river to be drowned. In the list of persons who could be guilty of parricide, or the murder of a blood relation, which is enumerated in the *Lex Pompeia de parricidiis*—B.C. 52—the father is not included (*Dig.* xlviii. 9).

[7] Such a sale did not make the son a slave; the transaction could only be with another Roman citizen with regard to whom the son, by the ceremony of *emancipatio*, was said to be bound *in mancipio;* but apart from him he continued to be regarded as both free and a citizen.

[8] *Code*, iv. 43, 1.

this enactment by making an exception permitting the sale of newly-born infants when the parents were in extreme poverty, but reserved to the parents, or anyone else, a right of redemption.[1] Justinian approved of the exception permitted by Constantine as regards the sale of new-born infants, but repeated the prohibition against the pledging of children, and enforced the law on the matter by making more severe the penalties to which creditors were liable who had taken children in security.[2]

A *paterfamilias* had originally the right to marry, divorce, or give in adoption any of his children who were subject to his authority, at his own absolute discretion; but this power came to be restricted in Imperial times, so that by the time of Justinian a father could neither give a son or daughter in marriage, or in adoption, nor divorce them without their consent;[3] indeed, divorce without the consent of the child was specially forbidden by a "Constitution" of the Emperor Marcus Aurelius. Finally, Justinian abolished "noxal surrender" (*noxae deditio*), or the ancient right of the *paterfamilias* to give up a child who had committed a delict or civil injury to the injured person, in the same manner as a master (*dominus*) could deliver up a slave, and free himself by that means from liability for the wrong done. The abolition of noxal surrender by Justinian was, however, purely formal, for the practice was practically obsolete by his time.[4]

There had prevailed under the Empire a practice of exposing newly-born children to perish of hunger or cold when the parents believed themselves too poor to rear them; but this was characterised as a crime and forbidden in A.D. 374 by an enactment of the Emperors Valentinian, Valens, and Gratian.

SECTION 31.—PECULIUM OF FILIUSFAMILIAS

It has been mentioned already[5] that the *patria potestas* possessed a twofold character, extending as it did over both the persons and the property of those who were subject to it. In respect of property the *potestas* of the Roman father was originally as absolute as that over their persons, and as a master's authority over his slaves. The *filius-familias* under the strict civil law had no proprietary capacity; he had,

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[1] *Code*, iv. 43, 2.

[2] *Nov.* 134, 7. The creditor was to forfeit his debt, pay to the child or to the parent a sum equal to the debt, and, in addition, suffer corporal punishment.

[3] *Cf.* Maine, *Ancient Law*, p. 138.

[4] Justinian, *Inst.* iv. 8, 7.

[5] *Ante*, p. 125.

indeed, both *commercium* and *connubium*, in respect of which he could make both a valid civil contract and enter into a valid civil marriage, but the rights so acquired vested by mere operation of law (*ipso jure*) in his *paterfamilias*, who alone took any benefit under the contract, and possessed *potestas* over the children of the marriage.

The general rule of the strict *jus civile* was, that whatever the son (*filiusfamilias*) acquired, whether by contract, inheritance, gift, or otherwise, was acquired for the father (*paterfamilias*), who alone had any right to it.[1] The son was, indeed, capable of contracting an obligation in respect of which he could be sued as a debtor,[2] but any rights as a creditor under such an obligation vested in the father, who alone was entitled to sue as such. This proceeded upon the same principle as that which was applied to a slave, to the effect that while a slave might make better he could not make worse the condition of his master;[3] for in respect of proprietary rights the position of a *filiusfamilias* was originally assimilated to that of a slave.[4]

Notwithstanding the fact that a *filiusfamilias* was legally incapable, under the strict law, of owning any property independently of his *paterfamilias* it became customary for a father to allow his son to retain a certain amount of property under his exclusive control, whether for administration or for the purpose of carrying on some trade or business. Such property was known as the son's *peculium*, and he held it on terms similar to those by which a master allowed his slave to hold and administer property. So long as the father permitted the son to retain the property in his possession it was, as regards third parties, as if it were the son's own, and he might be sued to the amount of the *peculium;* but, nevertheless, it continued to be legally the property of the father.

Early in the Imperial Period, in the reign of Augustus, the hitherto passive proprietary capacity of the *filiusfamilias* became active, and it came to be recognised for the first time that, in certain circumstances, a son, even when under paternal power (*in potestate*), might acquire and possess property as his own, independently of the *paterfamilias*. In this way there came to be recognised by the Roman Law several different kinds of *peculium*, namely: (1) *Peculium profectitium;* (2) *Peculium castrense;* (3) *Peculium quasi-castrense;* and (4) *Peculium adventitium.*

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[1] Justinian, *Inst.* ii. 9, 1.

[2] *Dig.* xliv. 7, 39.

[3] *Dig.* l. 17, 133: "*Melior conditio nostra per servos fieri potest deterior fieri non potest.*"

[4] See also on incapacity of a *filiusfamilias*, *ante*, Section 16 (*d*), p. 93.

(a) *Peculium Profectitium*

This was the name applied, in contradistinction to the other forms of *peculium*, to that property which the son was permitted by the father to retain and manage; it was, in fact, the *peculium* in its original sense. The *peculium profectitium* remained legally (*de jure*) the property of the father, but it was in fact (*de facto*) the property of the son; and, consequently, the *paterfamilias* was not liable for the son's debt beyond the amount of the *peculium* unless he had derived benefit from it, or had expressly or by implication authorised the son to contract as his agent.[1]

(b) *Peculium Castrense*

This was property acquired in any way by a *filiusfamilias* when serving as a soldier. The Emperor Augustus gave to a *filiusfamilias* who was a soldier an absolute right to any property he might acquire in that capacity; and the enactment by which this right was granted was subsequently adopted by later Emperors. Such property was distinguished by the name of *peculium castrense;* it included such things as pay, booty, gifts or legacies from comrades in arms, and also anything given to him by parents or relatives towards his outfit and military equipment; the *filiusfamilias* was at the same time given an absolute power of disposition *inter vivos* over property included within the *peculium castrense.*[2]

(c) *Peculium Quasi-Castrense*

This was a form of *peculium* instituted by the Emperor Constantine;[3] it was an extension of the privileges attaching to *peculium castrense* to persons *in potestate* who were not soldiers, but were filling the higher civil offices in the State, or exercising various public civil functions, or filling Court offices; and the term *peculium quasi-castrense* came gradually to include all official, public, and ecclesiastical salaries, fees earned by advocates, and gifts from the Emperor.[4]

The privilege of *peculium quasi-castrense* was originally conferred only upon those persons under power who were at the same time officials attached to the Imperial Palace,[5] but it came to be extended gradually to all persons performing public civil functions, such as officials of the Praetorian Prefect, clerks in the Chancery Court, keepers of public

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[1] Muirhead, *Roman Law*, 325.
[2] Cf. *Dig.* xlix. 17, 11; xiv. 6, 2; Justinian, *Inst.* ii. 12 pr.
[3] *Code*, xii. 31.
[4] Cf. *Code*, xii. 29, 31, 37.
[5] *Code*, xii. 31.

records; still later, in A.D. 440, it was extended to advocates of the Praetorian Court or the Court of the City Prefect, and in A.D. 469 to bishops, presbyters, and deacons, and Justinian ultimately extended the privilege to clergy of every grade.

The *filiusfamilias* was the absolute owner of the *peculium castrense* and *quasi-castrense*, and he might dispose of it during his lifetime, and, in the time of Justinian, in his testament, in any way he pleased, quite independently of the *paterfamilias;* but if he died without having disposed of it, either *inter vivos* or by will, the father was legally entitled to it.[1]

(*d*) *Peculium Adventitium*

This was the name applied, by the time of Justinian, to all property that neither was derived through the father (*paterfamilias*), nor was included within either of the terms *peculium castrense* or *quasi-castrense.*

Peculium adventitium originated in an enactment of the Emperor Constantine giving to a child *in potestate* the ownership of property inherited in any way from the mother (*bona materna*), but the administration and usufruct of the property were reserved to the father during his lifetime.[2] The Emperors Gratian and Honorius extended the term *peculium adventitium* to include all property acquired by a child under power through the maternal line (*bona materni generis*) upon any title;[3] and the Emperor Theodosius II. also included within the term property received by one of two married persons from the other (*lucra nuptialia*) in the form of dowry (*dos*) and *donatio propter nuptias.*[4]

Under the legislation of Constantine a father had not only the usufruct of the whole of the *peculium adventitium* during his lifetime, the right of the child being restricted to merely a bare ownership (*nuda proprietas*), but he had also a right to the ownership of one-third of the property if the son became emancipated. Justinian amended the law to the effect of giving the father only a usufruct of one-half of the *peculium adventitium* on the son's emancipation instead of the ownership of one-third.[5]

SECTION 32.—HOW PATRIA POTESTAS TERMINATED

The "power" or family authority of the Roman *paterfamilias* might be terminated either (*a*) directly or (*b*) indirectly.

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[1] Justinian, *Inst.* ii. 11, 6; *Code*, vi. 22, 12; *Dig.* xiv. 6, 2. The father was entitled to the son's property in such circumstances in the character of owner of the *peculium*, and not as heir on intestacy (*ab intestato*). Cf. *Inst.* ii. 12 pr.

[2] *Code*, vi. 60, 1.

[3] *Code*, vi. 60, 2.

[4] *Code*, vi. 61, 1.

[5] Justinian, *Inst.* ii. 9, 2; *Code*, vi. 61, 6, 3.

Direct termination of *potestas* was effected by either emancipation or adoption.[1]

Emancipation was the voluntary and deliberate act, on the part of a father, of freeing his son from his *potestas*. It had the effect of rendering the *filiusfamilias* independent of paternal authority (*sui juris*), and of severing the legal tie of agnation between him and the other members of the agnatic family; but a son's agnatic rights might be expressly reserved to him by Imperial grant or rescript.

In early Roman times the ceremony of emancipation took the form of a thrice-repeated fictitious sale or "mancipation" of the son by his father to a third person. The provision of the old law of the Twelve Tables, to the effect that if a father sold his son three times the latter should be free, was utilised for the purpose of freeing a *filiusfamilias* from *patria potestas*. The father, in such a case, specially arranged beforehand with the buyer that, having manumitted the son, *vindicta*, after each of the first and second sales, he would re-sell his son to him after the third sale, and would not manumit him himself, in order that the father might himself manumit his child and thereby free him from the bond of *mancipium* or quasi-slavery in which he stood towards him as his purchaser. In this way the parent would acquire the rights of a patron to the succession of his child, which would otherwise have belonged to the purchaser in the capacity of *extraneus manumissor*. Under the later Prætorian law an agreement to re-sell the son to his father was implied on the part of the fiduciary purchaser.

In later Roman times the process of emancipation of a *filiusfamilias* was much simplified; it might be effected either by an Imperial rescript, or more usually, in the time of Justinian, by a declaration before a magistrate with the mutual consent of both father and son, the declaration being thereafter entered and preserved in the records of the Court.[2] By emancipation in the later simplified forms the father or other ascendant acquired the same rights as a patron in the property of the child as if he were his freedman, as had been accorded to him under the older law; and if the child so emancipated was still under puberty the father became its legal tutor.[3] In the time of Justinian a son could not be emancipated against his will[4]; but he could competently be emancipated in absence under the Anastasian legislation, which, of course, was impossible under the old law, the forms of which required the presence of the parties.

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[1] See "Adoption," *post*, p. 132 *et seq.* In the time of Justinian adoption only terminated *potestas* if it was "full" adoption (*adoptio plena*), as contrasted with *adoptio minus plena*, or less than full (see Section 35, p. 137).

[2] Emancipation by Imperial rescript was known as *Emancipatio Anastasiana*, because it was first permitted in 503 A.D. by the Emperor Anastasius (A.D. 491-518), and emancipation by declaration before a magistrate was correspondingly styled *Emancipatio Justinianea*.

[3] *Cf.* Justinian, *Inst.* i. 12, 6.

[4] *Dig.* i. 7, 31.

Indirect termination of the *patria potestas* was operated independently of the deliberate voluntary act of either the father or the child by such circumstances as death, *capitis deminutio*, attainment by the child of high public office or dignity, by loss of liberty or of citizenship, or by gross misconduct on the part of the father, as by the exposure of his child,[1] or by his contracting an incestuous marriage,[2] or forcing a daughter to prostitute herself.[3]

In the case of death *patria potestas* was only extinguished if by the fact of the death of the ascendant the child became *sui juris* and legally independent, and did not merely pass into the power of another ascendant. Thus a grandchild would fall under the *potestas* of his own father if the father was still alive and unforisfamiliated at the death of the grandfather.[4]

In the time of Gaius a son became freed from *potestas* by becoming a priest of *Jupiter Dialis* (*flamen dialis*), and a daughter by becoming a vestal virgin.[5] Justinian also freed from *potestas*, by reason of the attainment of special dignity, those persons who had had conferred upon them the honour of the Patriciate,[6] which was a high rank created by the Emperor Constantine, and conferred only on persons who enjoyed the special confidence of the Emperor, and who had filled the offices of Consul, Praetorian Prefect, or "Master of Offices" (*Magister officiorum*).[7] Still later, Justinian extended the privilege of release from paternal power to all those persons who attained the dignity of Bishop, Consul, Praetorian Prefect, Quaestor of the Palace, Master of Soldiers (*Magister Militum*) and generally to all those persons who were exempted, by reason of the dignity of their office, from serving in the *Curia*, or local senate, in provincial municipal towns.[8] A child who was released from paternal power by the attainment of a post of honour and dignity did not thereby cease to be a member of the family of the *paterfamilias*, but, on the other hand, continued to retain his rights as a member of that family.[9]

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[1] *Code*, viii. 52, 2; i. 4, 24; *Nov.* 153, 1.

[2] *Nov.* 12, 2, 2.

[3] *Code*, i. 4, 12; xi. 40, 6.

[4] *Cf.* Justinian, *Inst.* i. 12 pr.; Gaius, *Inst.* i. 125-127.

[5] Gaius, *Inst.* i. 130.

[6] Justinian, *Inst.* i. 12, 4.

[7] *Code*, xii. 3, 3.

[8] *Nov.* 81.

[9] *Nov.* 81, 2. See upon the *Patria Potestas*, generally, Poste, *Institutes of Gaius*, 4th ed., 39 *et seq.*; Hunter, *Roman Law*, 188 *et seq.*; Moyle, *Institutes of Justinian*, 4th ed., 124, 239-241; Sohm, *Institutes of Roman Law*, 177 *et seq.*, 479-488; Roby, *Roman Private Law*, i. 64 *et seq.*; Mackenzie, *Roman Law*, 137 *et seq.*; Cuq, *Institutions Juridiques des Romains*, ii. 113 *et seq.*; Girard, *Manuel de Droit Romain*, 130-137; May, *Éléments de Droit Romain*, 83 *et seq.*

SECTION 33.—ADOPTION, GENERALLY[1]

The Romans attached great importance to the continuance of a family, and the Roman Law provided artificial means whereby a family that was in danger of becoming extinct, along with the *sacra* or sacred rites peculiar to it, through the death of its head without natural descendants might be preserved from such a fate.

From early times it was competent and usual for a *paterfamilias* who was himself childless and unlikely to become the father of a child of his own to adopt the child of someone else in order to perpetuate his family and to carry on and perform its peculiar *sacra*.

By the fiction of adoption a *paterfamilias* acquired the same paternal power (*patria potestas*) over the adopted child as a Roman citizen ordinarily obtained over his own children as the legal result of regular marriage.

It is thus apparent that the relation of father and child might be created either (*a*) naturally or (*b*) artificially according as it arose from the birth of children following upon marriage, or from adoption; but the legal effects were the same in both cases.

"Adoption" in a general sense may be defined as the admission of a member of one family into another family, whereby he lost his membership of and rights in his natural family, and acquired at the same time all legal rights as a member of his adoptive family, and came under the *potestas* of the head of his adoptive family to the same effect as if he had been born a member of that family.

Adoption assumed two special forms, known respectively and distinguished from each other as (*a*) "Arrogation," and (*b*) "Adoption" in a strict and narrow sense;[2] but both Gaius and Justinian use the term *Adoptio* in a general sense to signify either of these special forms.

(a) *Arrogation*

The adoption of a person who was already, at the time of the adoption, *sui juris* or legally independent of the *potestas* of any one, was known as "Arrogation" or "Adrogation." The person who adopted—*i.e.* the adopter—was styled the *adrogator*, and the person who was adopted was called the *adrogatus*. Arrogation was the oldest form of adoption amongst the Romans, and its effects were to transform a person from

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[1] Justinian, *Inst.* i. 11; Gaius, *Inst.* i. 97-107; *cf.* also Cuq, *Institutions Juridiques des Romains*, i. 234-244.

[2] *Cf.* Justinian, *Inst.* i. 11, 1; Gaius, *Inst.* i. 98, 99.

being one legally independent (*sui juris*) to the position of one subject to the family authority of another person (*alieni juris*). If, moreover, at the time of the arrogation the person so adopted was already married and had children under his *potestas*, these also, like and along with their father, came under the paternal authority (*patria potestas*) of the adopter (*adrogator*).[1] The person arrogated (*adrogatus*) suffered *capitis deminutio minima*,[2] or the least loss of legal status.

Adoption, whether in the form of "arrogation" or of "adoption" in a strict and narrow sense,[3] possessed a public character, for it involved an alteration in the number or character of families. The arrogation of a person who was himself the head of a family was only permitted when it had been publicly ascertained that the effect of the entry of such a person into a new family would not be to extinguish the family which he left and its sacred family rites along with it. Hence arrogation was a public act, which took place in the *Comitia Curiata* and was sanctioned by a *Lex Curiata* or public legislative act of the "Assembly of the Curies" (*Comita Curiata*) only after the public consent of the parties to the arrogation—the people (*populus*) as represented by the *Comitia*, and the College of Pontiffs or Priests as the guardian of the sacred family rites (*sacra privata*)—had been asked and given.[4]

By the time of Ulpian and Gaius the *Curiae* were represented merely by thirty lictors, and arrogation as a popular legislative act was a mere fiction. During the Empire, but at a date that is not exactly known, the old mode of arrogation in the form of a *Lex Curiata* was superseded by direct Imperial rescript (*principale rescriptum*), and this was the mode which alone prevailed in time of Justinian.[5] So long as it was necessary for the parties to an arrogation to appear in the *Comitia* and give their consents it was incompetent to arrogate women, for they were incapable of appearing in the *Comitia Curiata* and there giving the necessary consent,[6] but the supersession of the enactment of the *Comitia* by an Imperial rescript removed this incapacity.[7]

In the time of Justinian arrogation of a person of either sex was effected by an Imperial rescript (*principali rescripto*) after proof that the adopter was married[8] and over sixty years of age—unless, owing to some cause other than age, it was unlikely that he should become

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[1] Justinian, *Inst.* i. 11, 11 ; Gaius, *Inst.* i. 107.

[2] See *ante*, Part II., Section 6, pp. 75, 76.

[3] See *post*, p. 135.

[4] For the form of the assents to arrogation see Cicero, *De Domo*, 29 ; see also Hunter, *Roman Law*, 205. Gaius accounts for the name "arrogation" by explaining that it was so styled because the person adopting was "asked" (*rogatur*) whether he consented, the person adopted was similarly interrogated, and so also the people present in the Assembly (*in Comitia*). *Cf.* Gaius, *Inst.* i. 99.

[5] Justinian, *Inst.* i. 11, 1.

[6] *Cf.* Gaius, *Inst.* i. 101.

[7] Justinian, *Inst.* i. 11, 1 ; *Dig.* i. 7, 21.

[8] Cic., *Pro Domo*, xiii. 15.

the father of a child[1]—that he was at least eighteen years older than the *adrogatus*,[2] and that he had no other legitimate or adopted children.[3]

It was incompetent for either a tutor or curator to arrogate a person *sui juris* who had been under their guardianship lest they should thereby take advantage of the fiduciary relation in which they had stood to the ward's prejudice.[4]

Until the reign of the Emperor Antoninus Pius (A.D. 138-161) it was incompetent to arrogate a person under puberty who was *sui juris*, although the adoption as distinct from the arrogation of an *impubes* was always competent.

The arrogation of a person under the age of puberty was only permitted after inquiry into the circumstances and as to the motive for the arrogation, in order to determine whether the proceeding would be to the advantage of the pupil; and further, if the arrogation was permitted it was subject to certain conditions,—the adrogator had to give public security that, in the event of the *adrogatus* dying before attaining puberty, he would restore his property to the pupil's natural heirs who would have succeeded him if no adoption had taken place; if the pupil was emancipated or disinherited before puberty the adrogator was bound to give him back the property he had acquired through him by the arrogation; and, moreover, if the pupil was emancipated or disinherited without good reason (*sine justa causa*) the arrogator was bound, in addition to restoring the pupil's property, to give him a fourth part of his own property:[5] the portion of the arrogator's property to which a pupil was entitled in such circumstances was known as the *Quarta Antonina*, as having been first sanctioned by the Emperor Antoninus Pius.[6]

Justinian assimilated the property of a person *adrogatus* to *peculium adventitium*, and gave to the adopter (*adrogator*) only a usufruct of such property, the ownership of the property remaining with the *adrogatus*.[7] The rights of creditors of a person arrogated were not prejudiced by the arrogation, for although by the strict *jus civile* the debts of an *adrogatus* were extinguished by reason of the *capitis deminutio* involved in the change of *status*, the Praetor held the property of the adrogated person liable for the debts, and by an action based upon the fiction that *capitis*

[1] *Dig.* i. 7, 15, 2.
[2] Justinian, *Inst.* i. 11, 4.
[3] *Dig.* i. 7, 17, 3.
[4] *Dig.* i. 7, 17 pr.
[5] Justinian, *Inst.* i. 11, 3.
[6] It was, for the same reason, also styled *quarta D. Pii.*
[7] Justinian, *Inst.* iii. 10, 2.

deminutio had not taken place would put the creditors in possession of such property, with a power of sale, unless the arrogator consented to guarantee their claims.[1]

(b) *Adoption, Specially*

"Adoption" (*adoptio*), in a strict and narrow sense, as distinguished from "arrogation" (*arrogatio*), was the transference of a person who was already *alieni juris* to the power (*potestas*) of another person.

In the time of Justinian adoption of a person of either sex was effected in a simple manner by the execution of a deed, in the presence, and with the sanction of a magistrate[2] possessing jurisdiction for the purpose, such as the Praetor at Rome or the Governor in a Roman province,[3] in which the fact of the adoption was embodied and declared; and there required to be present in order to give consent only the parties immediately involved in the adoption, namely, the person giving in adoption, the person being given in adoption, and the person receiving in adoption.[4] In the case of the person adopted, tacit consent sufficed.[5]

The adoption of a person already in the power (*potestas*) of a *paterfamilias* is styled by both Gaius and Justinian *adoptio imperio magistratus*, whereas "arrogation," or the adoption of a person already *sui juris*, is called by Gaius *adoptio populi auctoritate*, or "by the people's sanction," and by Justinian *adoptio principali rescripto*, or "by imperial rescript"; the difference in terms employed connotes the change that had taken place in the mode of arrogation between the time of Gaius and that of Justinian.

Prior to the time of Justinian, and under the earlier law, adoption, distinguished from arrogation, was effected by a double process of "emancipation" (*emancipatio*) *per aes et libram*, or "by the brass and scales," and *cessio in jure*, or "surrender in Court." The natural father first of all destroyed his *potestas* over his son by three fictitious sales in the form of a "mancipation," according to the terms of the Twelve Tables; the son was then *in mancipio* to the purchaser, who thereupon, in a fictitious form of action known as *in jure cessio*,[6] claimed the child as his, and this

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[1] Gaius, *Inst.* iii. 84; iv. 38; Justinian, *Inst.* iii. 10, 3. Such an action was an *actio rescissoria ficticia*, to which class also belonged the "Paulian" Action, "Rutilian" Action, "Publician" Action, and "Servian" Action (Gaius, *Inst.* iv. 35-38). See, on fictitious actions, Poste's *Gaius*, 476 *et seq.*

[2] *Imperio magistratus.*

[3] *Cf.* Gaius, *Inst.* i. 101, 102.

[4] Justinian, *Inst.* i. 11, 1; Gaius, *Inst.* i. 99. *Cf.* French Civil Code, Art. 353 *et seq.*

[5] Justinian, *Inst.* i. 12, 8; *Code*, viii. 48, 11.

[6] Upon the distinction between the expressions *in jure* and *in judicio*, see *ante*, p. 26, note 4, and *post*, p. 215, note 3.

being either acknowledged, or not resisted by the natural father, the magistrate admitted the claim and gave the child into the *potestas* of the adoptive father.[1]

Section 34.—Who Could Adopt

Every man, whether married or unmarried,[2] had the right to adopt, provided he was legally capable of contracting marriage; persons incapable of procreation through natural impotence (*spadones*) could both arrogate and adopt, but those who had been made eunuchs (*castrati*) could not do so.[3] Under the earlier law women could not adopt, because adoption involved the passing of the adoptee under the *patria potestas* of the adopter, and women could not possess *potestas*;[4] the Emperors Diocletian and Maximian, however, by a "Constitution" in A.D. 291 granted them the right to adopt children in either form,[5] as a consolation for the loss of their own children;[6] but such adoption did not give women any *potestas* over the children; it only placed them in the same legal position towards her as her own children would have held.

The person adopting required to be of full age—twenty-five complete years—and legally independent (*sui juris*). It was, moreover, a maxim of the Roman Law that "adoption imitates nature,"[7] so that a person could neither arrogate nor adopt another who was older than himself. There required to be such a difference of age between the adopter and the person adopted as would render it naturally possible that the former could have been the father of the child, and the law fixed this discrepancy of age at eighteen years.[8] This rule, however, was not invariably followed.[9] A man without any children could adopt another person, not only as a child but also as a grandchild; or the grandchild of another person as his child;[10] but if he adopted a grandson specially as the son of a particular son already in his power, whether naturally or by adoption, the consent of the latter was requisite, otherwise the adopted grandchild would not come under the *potestas* of the adopter's son on the death of the adopter;[11] but, on the other hand, the

[1] *Cf.* Gaius, *Inst.* i. 134; Justinian, *Inst.* i. 12, 8.
[2] *Dig.* i. 7, 30.
[3] Justinian, *Inst.* i. 11, 9; Gaius, *Inst.* i. 103.
[4] Gaius, *Inst.* i. 104.
[5] *Cf.* Poste, *Institutes of Gaius*, p. 65.
[6] Justinian, *Inst.* i. 11, 10; *Code*, viii. 48, 5.
[7] *Adoptio enim naturam imitatur.*
[8] Justinian, *Inst.* i. 11, 4; *Dig.* i. 7, 15, 3; *Dig.* i. 7, 16; *Dig.* i. 7, 40, 1. *Cf.* Gaius, *Inst.* i. 106.
[9] See, for an instance, Mackenzie, *Roman Law*, 133.
[10] Justinian, *Inst.* i. 11, 6.
[11] Justinian, *Inst.* i. 11, 7; *Dig.* i. 7, 6; i. 7, 10; i. 7, 11.

consent of a son was not necessary in order to give a grandchild in adoption,[1] the reason for this rule being that while a grandfather could, in his discretion, diminish the number of a son's family he could not increase it, for otherwise the son would have had forced upon him, without his consent, a *suus heres* to share in his succession,[2] and so reduce proportionately the amount of the shares divisible among his other heirs.

SECTION 35.—EFFECTS OF ADOPTION

Under the older law an adopted person lost all the rights that he had formerly possessed as a member of his natural family and acquired rights as a member of his adoptive family as fully as if he had been the son of his adoptive father in lawful marriage, and at the same time he passed from the paternal power of his own father into that of his adoptive father, losing all further legal connection with, or rights of succession as a member of his own family, and substituting for these similar ties and rights in his new family. Adoption, however, unlike arrogation, did not affect the status of the adoptee, and operate a *capitis deminutio.*

The Emperor Justinian made radical changes in the law of adoption which completely altered its character and effects.[3] In the time of Justinian the legal results of adoption differed according as the person was adopted by a stranger or by an ascendant of his own family, such as a grandfather.

If the adopter was a stranger, the adopted person, contrary to the rule of the older law, remained under the *potestas* of his own father, and retained all his rights as a member of his natural family, whilst he acquired in addition a right of succession to his adoptive father only if the latter should die intestate;[4] for an adoptive father, if he were a stranger, was not bound, as was the natural father, to leave any portion of his property to an adopted child in his will. An adoptive father who was not an ascendant of the adoptee did not acquire *patria potestas* over him by the fact of adoption.

Adoption by a stranger was thus known as *adoptio minus plena* or "adoption less than full," in contradistinction to *adoptio plena* or "full" or "complete," adoption, which was the giving of a child in adoption by

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[1] Justinian, *Inst.* i. 11, 7.

[2] Justinian, *Inst.*, *ut supra.* A *suus heres* was a person in the power of a deceased person who became *sui juris* by the latter's death. Such persons (*sui heredes*, plural) had, by law, the first claim to the succession of a deceased intestate *paterfamilias.*

[3] *Code*, viii. 48, 10.

[4] Justinian, *Inst.* i. 11, 2; *Code*, viii. 48, 10. *Cf.* French Civil Code, Art. 348.

its father, who had himself been emancipated from paternal power, to a direct male ascendant.

In the case of *adoptio plena* the rules governing the older law of adoption prevailed and the child passed under the power of the adopter, and acquired rights as fully as if he were his own son, whilst at the same time he lost all rights as the son of his own father.[1]

The reason for the change made in the law of adoption was that if an adopted child was subsequently emancipated by his adopter—which under the older law, in virtue of the extent of the *patria potestas*, the adopter might do without the child's consent—he would lose all right of succession as an agnate in both his natural and his adoptive family. The rule of the older law, however, was preserved in the case of adoption by an ascendant, because it was considered that in such a case "the rights of nature and adoption concur in the same person,"[2] and consequently the natural affection arising from ties of blood-relationship would presumably restrain the adopter from emancipating an adopted child to its prejudice.[3]

Under the later Roman Law a child could not be given in adoption to another without its consent; but that might be tacit.[4]

"Arrogation" and *adoptio plena* are sometimes called "regular" adoption because they created *patria potestas* in the adopter, as contrasted with those forms of adoption which did not create *patria potestas*, such as *adoptio minus plena* and adoption by a woman, which are sometimes correspondingly styled "irregular."[5]

The French Civil Code recognises adoption and permits it in the case of persons over fifty years of age having no children or legitimate descendants, and it requires, further, a difference of fifteen years at least between the age of the adopter and that of the person adopted.[6]

Section 36.—Legitimation[7]

Children that had not been born legitimate in respect of being the offspring of lawful marriage might be "legitimated," or put into the position as if they were children of a lawful marriage, in certain ways recognised by the law, and might acquire in such ways all the *status* and rights of lawful children. Legitimation created *patria potestas* to the same effect and extent as both marriage and adoption, but between

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[1] Justinian, *Inst.* i. 11, 2; *Code*, viii. 48, 10.
[2] *In unam personam concurrunt et naturalia et adoptionis jura.*
[3] Justinian, *Inst.* i. 11, 2.
[4] Justinian, *Inst.* i. 12, 8.
[5] *Cf.* Didier-Pailhé, *Droit Romain*, 64, 72.
[6] See French Civil Code, Arts. 343-360.
[7] Justinian, *Inst.* i. 10, 13.

these three modes in which *patria potestas* arose there was this distinction, that through marriage paternal power was *naturally* acquired through the subsequent birth of lawful chilren, whereas in the case of both adoption and legitimation the paternal power was created only *civilly* and *artificially* by process of law.

In the time of Justinian legitimation of natural children was effected in three different ways, namely, by (1) subsequent marriage (*per subsequens matrimonium*); (2) Imperial rescript (*per rescriptum principis*); (3) oblation to the Curia (*oblatio Curiae*).

Legitimation "by subsequent marriage" was introduced into the Roman Law in the reign of the Emperor Constantine;[1] Justinian extended the requirements of the law upon this matter, and necessitated the fulfilment of three conditions in order to render a legitimation by this means complete: (1) at the time of the conception of the child there must not have existed any legal impediment to the marriage of the parents; (2) the marriage must be evidenced by a legal instrument properly executed; and (3) the child must consent, or at least not object, to the legitimation.[2]

The object and effect of the requirement by the parents of legal capacity to contract marriage at the time of the conception, rather than that of the birth of the child, was to exclude children born in adultery, or as the issue of an incestuous union, or of a union between a citizen and a slave. The ratification of the child to the legitimation was required because it was considered only equitable that a person who was legally independent (*sui juris*) by reason of having been born illegitimate ought to have the right of refusing to be put under *potestas* and of becoming subject to the family authority of another person (*alieni juris*).[3]

The effect of legitimation *per subsequens matrimonium* was to bring an illegitimate child under the *patria potestas* of the father, and to invest the child with all legal rights as the child of such father as fully as if it had been born in lawful marriage.[4]

By the Roman Law, legitimation by subsequent marriage was only competent in the case of "natural" children born in concubinage, and "spurious" or bastard children could not be rendered legitimate by that, or, indeed, in any way. The later Canon Law, however, extended

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[1] *Code*, v. 27, 5-7.

[2] The legislation of Constantine had required for a valid legitimation that the woman should be freeborn and that there must be no children living by a lawful wife; but Justinian dispensed with these requirements.

[3] *Nov.* 89, 11 pr.; *cf.* also *Dig.* i. 6, 11; i. 7, 5.

[4] See Justinian, *Inst.* i. 10, 13; iii. 1, 2; *Code*, v. 27, 10-11.

the privilege of legitimation by the subsequent marriage of the parents to bastard children provided that at the time of conception the parents could have legally contracted marriage with each other, and that the children were not the offspring of an incestuous union or of an adulterous intercourse; and this equitable rule of the Canon Law, extending, as it does, the application of the principle of the Roman Law, has found a place in the law of France,[1] and in that of Scotland also, as well as in the Roman-Dutch Law; but the principle of legitimation *per subsequens matrimonium* is not recognised in English Law, according to which the child is born legitimate if the parents are married at the time of the child's birth, but a child born before the marriage of the parents cannot subsequently be legitimated.[2]

Legitimation by Imperial Rescript (*per rescriptum principis*) was introduced by the Emperor Justinian,[3] and was applied in these cases where, owing to various special reasons, legitimation by the subsequent marriage of the parents was impossible, as where the mother had died, or had disappeared, or was already married to some other person, or was undeserving of marriage. In such circumstances "natural" children, upon the application of the father, and if there was not any legitimate child, might be declared legitimate by an Imperial rescript and be thereby placed in the same legal position as if the marriage of the parents had taken place.[4] Moreover, even after the death of the father "natural" children might apply to be legitimated by Imperial grant, if the father had not during his lifetime applied for a rescript legitimating them, but in his testament had expressed his desire that they should succeed to his property as his lawful children and as heirs on intestacy (*ab intestato*).[5] The legitimation thus effected by testament was confirmed and made effective by the Imperial rescript.

Legitimation by oblation to the *Curia* (*per oblationem Curiae*) was first introduced into the Roman system by the Emperors Theodosius and Valentinian in A.D. 443, and was subsequently extended in its operation.

The *Curia* was the local senate in municipal towns (*municipia*) in the Roman provinces, and it formed the class from which the provincial magistracy was drawn. Membership of the *Curia* carried with it social distinction, but the duties attached to the office were so onerous, and exacting, and expensive as to be considered, at one time, to more than counterbalance the dignity it conferred, and it became increasingly

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[1] French Civil Code, Arts. 331-342.
[2] Stephen, *Commentaries on the Law of England*, 12th ed., p. 289.
[3] *Nov.* 74, ch. i., 2.
[4] *Nov.* 89, ch. ix.
[5] *Nov.* 89, ch. x.

difficult to get citizens to undertake the office.[1] In order, therefore, to obviate the risk of the order of *Curiales* becoming extinct, the dignity of the *Curia* being hereditary,[2] the aid of legislation was invoked to the effect of providing, by the time of Justinian, that citizens, whether themselves members of the *Curia* or not, might legitimate their natural children by presenting them to and making them members of the *Curia* either during the father's life or in his testament; and a "natural" son who undertook the office of a "decurion" (*decurio*), became thereby legitimate. This privilege was also extended to a natural daughter to the effect of making her legitimate if she married a "decurion."

The effect of legitimation by oblation to the *Curia* was limited in its character, for while a child was thereby made legitimate and brought under the *potestas* of the father to whom at the same time it acquired legal rights of succession, it nevertheless created no relationship or rights of succession to any other members of the family.[3]

SECTION 37.—MARRIAGE[4]

Marriage is defined in the *Digest*[5] as "a union of a male and a female creating a lot in common (*consortium*) for both throughout their lives." Marriage was by the Roman Law regarded as a contract whereby a man and woman mutually agreed, according to certain forms prescribed by law, to be united as man and wife during the rest of their lives.[6] Marriage was of two kinds, distinguished respectively as *matrimonium justum* and *matrimonium non justum*; the former was otherwise styled *justae nuptiae* and constituted "regular" marriage, in respect that it was contracted in certain ways peculiar to the *jus civile*, which alone created *patria potestas* and other civil family rights, such as those of agnation and succession, and which were competent only to Roman citizens or

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[1] *Code Th.*, xii. 1, 66; *Code*, x. 31, 38.

[2] *Code*, x. 31, 44.

[3] See *Code*, v. 27, 3, 4; v. 27, 9; *Nov.* 89, 2, 1-6; 89, 4. See also on Legitimation, Mackenzie, *Roman Law*, 127 *et seq.*; Moyle, *Inst.* 136, 137; Hunter, *Roman Law*, 201-203.

[4] *Dig.* xxiii.-xxv. Justinian, *Inst.* i. 9; Gaius, *Inst.* i. 56-64; *Code*, v. 1-27. *Cf.* on Marriage generally, Sohm, *Institutes of Roman Law*, 3rd. ed., 452-478; Roby, *Roman Private Law*, i. 127-168; Muirhead, *Roman Law*, part i. s. 14; part iii. s. 42; part iv. ss. 57 and 68; Leage, *Roman Private Law*, 82-97; Girard, *Manuel de Droit Romain*, 142-164; May, *Éléments de Droit Romain*, 94-112; Didier-Pailhé, *Droit Romain*, ch. iv.; Colquhoun, *The Roman Civil Law*, vol. i. ss. 531-658; Sandars, *Institutes of Justinian*, 30-40; Cuq, *Institutions Juridiques des Romains*, i. 204-229.

[5] *Dig.* xxiii. 2-1.

[6] *Cf.* Justinian, *Inst.* i. 10 pr.

to such persons as had conceded to them, as a special privilege, the right of marrying according to the forms of the *jus civile* (*jus connubii*). *Matrimonium non justum*, on the other hand, was "irregular" marriage, in respect that it signified the union of persons both or one of whom did not possess the *jus connubii*, and who, consequently, did not possess the legal capacity to contract a marriage in any of the ways that were requisite to constitute "regular" marriage (*matrimonium justum: justae nuptiae*) according to the strict *jus civile*, with its resulting legal effects.

> *Matrimonium non justum* was thus informal marriage, constituted merely by consent and cohabitation; it was otherwise styled *matrimonium jure gentium*, or marriage according to the principles of the *jus gentium;* and within this category there were included unions between Latins, or between Roman citizens and non-citizens, or between peregrins. But *matrimonium non justum*, although not regarded by the strict *jus civile* as constituting a true legal marriage to the effect of creating *patria potestas* and giving rise to those other civil rights peculiar to unions contracted by persons possessing the *jus connubii*, was yet considered as lawful and binding marriage, and the children of such informal unions were legitimate.

Under the early Roman Law only those unions were regarded as true legal marriage (*justae nuptiae*) which were competent to give rise to what was known as *Manus*.

Manus was the power which a Roman husband enjoyed, under the early law, over both the person and the property of his wife; it was a power as absolute and unrestrained as that of a father over his children in respect of his *patria potestas*, or of a master over his slaves by reason of the *dominica potestas*.[1]

The passing of a woman under the "hand" (*conventio in manum*) of her husband was not essential to the validity of a Roman marriage,[2] and a Roman wife only passed *in manu*, or under the marital authority of her husband, if she expressly consented to do so. The only effect of a marriage being contracted with or without *manus* was with regard to the legal position of the wife; if she consented to marry with *manus* the legal consequences were that she passed completely out of her own family into that of her husband, towards whom she was placed by the law in the relation of a daughter (*filiafamilias*) subject to his *patria potestas*, and the husband, at the same time, became entitled absolutely to any property she then possessed or might subsequently acquire. The wife, by consenting to marry with *manus*, acquired the title of *materfamilias*

[1] Gaius, *Inst.* ii. 98; Livy, 39, 18; Tacitus, *Ann.* xiii. 32. See also on "Manus," Sohm, *Inst.*, 3rd ed., 459-465.

[2] Ulpian, *Frag.* xxvi. 7.

or "family mother," but if she did not so consent she was known only as *matrona* or "matron," or as *uxor* or "wife," and she did not, in the latter case, pass into her husband's *potestas*, but remained in that of her own *paterfamilias*, or tutor, and retained her own property, with the exception of the *dos* or dowry provided by the marriage contract, quite separately from that of her husband, and also the right to administer and dispose of it; but with the retention of her own property apart from that of her husband the wife also lost any right to be maintained by her husband.

Marriage with *manus* (*cum manu*) was almost invariable during the early period of Roman history, and such a union was only contracted in one or other of three ways which were long regarded by the law as alone competent to constitute *Justae nuptiae* or true legal marriage. Any union contracted in a way that under the ancient law would not have been competent to create *manus* was a *matrimonium jure gentium*, and that term was also employed, under the later law, to signify a lawful marriage of persons who did not possess *connubium*.

Marriage with *manus* was peculiar to the strict *jus civile* and was unknown to the *jus gentium*; it was effected in three different ways which, during the earliest phases of the Roman Law, were the only modes of validly giving expression and evidence of the consent of parties to be united in the bond of matrimony.[1] It was the consent to live as husband and wife which constituted the contract, but that consent required to be expressed in certain forms in order to determine the legal relations of the parties.

Marriage with *manus* was effected by means of either (1) *Confarreatio*; (2) *Co-emptio*; or (3) *Usus*.

Confarreatio was a very solemn religious ceremony competent only to patricians as possessing the *jus sacrum*. The essential part of this procedure was the employment of cakes of wheaten flour in the form of a sacramental rite by the parties, in the presence of at least ten witnesses, the effect of which was to bring the wife into the possession of the husband by creating *manus* over her.[2]

Co-emptio was entirely a secular or civil mode of marriage, and was competent to plebeians, just as *Confarreatio* was the religious form of marriage confined to those who were patricians. It was, as described by Gaius,[3] a fictitious purchase of the wife by the husband in the presence of at least five citizens. It was an adaptation of the old ceremony of *mancipatio*, employed from early times for the ordinary

[1] Gaius, *Inst.* i. 110.
[2] See Gaius, *Inst.* i. 112.
[3] Gaius, *Inst.* i. 113.

transfer of property,[1] as a result of which the woman passed into the possession of her husband, who thereby acquired *manus* over her[2] and she at the same time passed out of her own family and became a member of her husband's household, subject to his domestic authority, and in the relation of a daughter towards him.[3] The simplicity of *co-emptio* in order to contract marriage with *manus* as compared with *confarreatio*, and the fact that the legal effects of each mode were the same, rendered it for long the most usual mode of creating *manus* both amongst patricians and plebeians.[4]

Usus was a mode of contracting lawful marriage (*justae nuptiae*), and of acquiring *manus*, by the continued and uninterrupted cohabitation of a man and a woman for a complete year, with the intention of thereby creating a matrimonial union.[5] *Usus* was, in effect, the acquisition of a wife by a man in respect of his continued possession of her during a period fixed by the law. This mode of contracting marriage was based upon the principle governing "usucapion" (*usucapio*) by which, on the authority of the Twelve Tables, a prescriptive title to property might be acquired through mere lapse of time by uninterrupted possession during a certain period.[6]

If the wife did not desire to pass under her husband's *manus* she was entitled to absent herself from his roof for three consecutive nights in the course of the year; the absenting of herself by the woman had the effect of interrupting the continuity of the husband's possession. If, however, the woman did not so absent herself, the expiry of the year caused her to pass under her husband's *manus*, with all the consequent results that have been already mentioned.

No particular form or ceremony was requisite to validate a marriage by *usus*. This mode of marriage was based upon the view of the ancient law which regarded a daughter as the property of her father, of which he might dispose as he pleased. If the woman had not been delivered

[1] See Muirhead, *Roman Law*, 2nd ed., 56 *et seq.*; Poste, *Institutes of Gaius*, 70; Roby, *Roman Private Law*, i. 70.

[2] Gaius, *Inst.* i. 113, 123. See also as to effects of "co-emption," Gaius, iii. 83, 84; iv. 38, 80.

[3] See Muirhead, *Roman Law*, 2nd ed., 64, 65; Sohm, *Institutes of Roman Law*, 3rd ed., 452.

[4] The process of "co-emption" came to be applied with other objects than merely to contract a legal marriage (*co-emptio matrimonii causâ*). It was employed by a woman to get rid of an undesirable guardian (*co-emptio tutelae evitandae causâ*), or in order to be able to dispose freely of property by testament (*co-emptio testamenti faciendi causâ*), or to be freed from the obligation to perform the family *sacra* or sacred rites (*co-emptio interimendorum sacrorum causâ*). See Poste, *Institutes of Gaius*, 71.

[5] Gaius, *Inst.* i. 111.

[6] See "Usucapion," Part III., Chapter V., *post*, p. 234.

to her husband in the course of a formal and religious *Confarreatio*, or by a civil purchase in the form of a *Co-emptio*, she might yet be acquired by the man, if they mutually consented to live together as husband and wife, as fully and to the same effect as by means of *Confarreatio* or by *Co-emptio*, through *usucapio* or uninterrupted possession.[1]

In course of time marriage with *manus* in the three old modes peculiar to the strict *jus civile* fell into disuse, and "free" marriage, or informal marriage without *manus*, which was originally merely *matrimonium jure gentium*, had come by the time of Cicero to be recognised as itself constituting regular marriage (*justum matrimonium*), to the effect of bringing the children of such a union under the *potestas* of the father, although the wife did not thereby pass under the domestic authority of her husband.[2]

Marriage with *manus* was practically obsolete by the time of Gaius; by that time *usus* was actually obsolete, and *Confarreatio* only existed, to a very limited extent, for one special purpose, and *Co-emptio*, as creative of *manus*, only existed in theory.[3]

Long before the time of Justinian all that was requisite for the constitution of a valid legal marriage with its full effects was the mere consent of parties,[4] however informally expressed, and the contract was completed by either an actual or a constructive passing of the woman into the possession of the man, which fact was most usually, but not necessarily, evidenced by her being received into his house;[5] this act was known as the *deductio in domum mariti*, and was the formal conveyance of the bride from the house of her father, or other guardian, to that of her husband, where, in effect, the contract was completed by the delivery of the woman into the possession of the man, on the analogy of a "real" contract,[6] to which marriage was thus apparently, in theory, assimilated.[7]

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[1] *Cf.* Sohm, *Institutes of Roman Law*, 454.

[2] *Cf.* Roby, *Roman Private Law*, i. 71; Sohm, *Institutes of Roman Law*, 3rd ed., 456 *et seq.*

[3] *Cf.* Gaius, *Inst.* i. 111-113; i. 136. The special purpose was to qualify a person to be a *rex sacrorum* or one of the greater "flamens"; these offices could only be held by persons born of parents who had been married by "confarreation," and they themselves required to be married in the same way. The effect of such *confarreatio* was limited by a *Senatus-Consultum* in the reign of the Emperor Tiberius to merely produce *manus* in order to give the wife her husband's *sacra;* otherwise, for all secular purposes, the marriage was without *manus*, and the wife remained a member of her old agnatic family (Gaius, *Inst.* i. 136; Leage, *Roman Private Law*, 89).

[4] *Dig.* xxiii. 2, 2; *Code*, v. 4, 22; *Nov.* 117, 4; see Muirhead, *Roman Law*, 388.

[5] *Cf.* Muirhead, *Roman Law*, 2nd ed., 323 and 388.

[6] *Cf.* Moyle, *Institutes of Justinian*, 4th ed., 129, Commentary. See also on "real" contracts, "Obligations," Part IV., *post.*

[7] *Cf.* Mackenzie, *Roman Law*, 96, 97; also Ortolan, *Institutes of Justinian*, 9th ed., ii. 82. See also on this point Poste, *Institutes of Gaius*, 46.

It was, however, at all times, the consent of the parties which was recognised as essentially constituting the matrimonial tie, and not the particular mode in which that consent was expressed, although the law in its earliest period required that the consent should be expressed in certain modes in order to constitute valid legal marriage and give rise to the full consequences of such. The principle of the law was "consent and not cohabitation constitutes marriage";[1] in other words, the essential requisite was the mutual consent to live together as husband and wife, with the intention that their cohabitation should create that relation.

In "free" marriage, or marriage without *manus*, the wife did not pass into her husband's family, and she retained any property that she possessed or subsequently acquired, except in so far as her rights might have been qualified by the terms of a marriage contract. Both husband and wife separately retained their rights in their own property, and their marriage did not give to either any rights in the property of the other, unless in so far as such property had been dealt with as a dowry (*dos*) or "marriage portion," or as a *donatio propter nuptias*, or a gift made in contemplation of the marriage.[2] During the Empire "free" marriage alone prevailed, constituted by mere consent of parties and dissolved in the same way. As a general rule, no writing of any kind was requisite either to validate or to evidence the marriage, but this freedom led to divorce becoming so common as to constitute a real social danger to the State, and the law came to require some outward evidence, either actual or constructive, of the serious consent of parties to create the relation of husband and wife between them, in order to distinguish those who were really married from those who were merely cohabiting.[3] In this way, although simple consent remained the foundation of the contract of marriage, it became usual, until the time of Justinian, who dispensed with the necessity in the general case, to formally execute a marriage contract in which the fact of the mutual consent of the parties was duly recorded and witnessed.[4]

The distinction between different modes of marriage and their effects finally disappeared during the Imperial Period through the extension of citizenship to all free subjects of the Empire in the reign of Caracalla (211-217 A.D.), which carried with it the right of *connubium*, and which

[1] *Dig.* l. 17, 30. "*Nuptias non concubitus sed consensus facit*" (*cf. Dig.* xxxv. 1, 15).

[2] See "Effects of Marriage," Section 40, p. 156, and on "*Dos*" and "*Donatio propter nuptias*," *post*, Sections 41-46, pp. 158-166.

[3] *Cf.* Moyle, *Institutes*, 129, Commentary.

[4] It was still requisite, in the time of Justinian, in the case of marriages of persons of high rank, and of great dignitaries. See *Nov.* 117, 4; 74, 4, 5; Muirhead, *Roman Law*, 388.

latter term came then to signify generally the capacity to contract a valid legal marriage.[1] *Matrimonium jure gentium*, or that mode of marriage that did not necessitate any special form apart from the matrimonial intention of the parties, and the expression of that intention in some manifest way, came itself to be recognised as *matrimonium justum* or *justae nuptiae*, irrespective of whether or not it was creative of *manus*, and it gave rise to *patria potestas* and the other legal results of marriage as fully as had *justae nuptiae* under the older law.[2] The term *materfamilias* had been formerly employed to signify a wife who, under the earlier law, had passed under the *manus* (*in manum*) of her husband, in contradistinction to *matrona* or "matron," which signified a wife under a marriage *jure gentium*; under the later law, however, the term *matrona* came to be employed to signify generally all married women.[3]

An agreement to marry was usually, although not necessarily, preceded by mutual promises to marry at a future date (*sponsalia*), which constituted the state of betrothal. This was originally effected by a "stipulation"[4] and "re-stipulation," under which an action would lie for a penalty in the event of breach. Under the later law betrothal by formal stipulation came to be discontinued, as *contra bonos mores*,[5] in favour of a bare promise to marry, and it was usual at the same time to exchange mutual gifts as "earnest" of the undertaking (*arra*),[6] which were forfeited by either of the parties who failed to fufil the promise;[7] but the promise itself did not, at Rome at least,[8] give rise to an action for its enforcement.

SECTION 38.—REQUISITES FOR VALID MARRIAGE

The general requisites for the constitution of a valid marriage under the Justinianian law were (1) physical capacity; (2) consent; and (3) legal capacity.

Under the earlier law, in order to constitute *justae nuptiae*, there was a further requisite in the form of *connubium*. *Connubium* was either absolute or relative; the former qualification implied that the parties were Roman citizens, or otherwise enjoyed the *jus connubii* as a special privilege, and the consequent capacity to contract *justae nuptiae* or *legitimum matrimonium*, or *matrimonium justum*, while

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[1] *Cf.* Ulpian, *Frag.* v. 3. See also Section 39, p. 151.
[2] *Cf.* Sohm, *Institutes of Roman Law*, 3rd ed., 456 *et seq.*
[3] Aul. Gell., *Noct. Attic.* xviii. 6; Cic., *Top.* c. 3. See *ante*, p. 143.
[4] *Dig.* xxiii. 1, 2.
[5] Cf. *Dig.* xlv. 1, 134.
[6] See *Code*, v. 1.
[7] *Cf.* Moyle, *Inst.* 129.
[8] *Cf.* Sohm, *Inst.*, 3rd ed., 457; Mackenzie, *Roman Law*, 96. See also on "*Sponsalia*," Roby, *Roman Private Law*, i. 132, 133.

the latter qualification implied that the parties were not within the prohibited degrees of relationship.

Marriage between persons who did not possess absolute *connubium* was *matrimonium non justum*, or *matrimonium jure gentium*. It was sometimes styled simply *nuptiae*, as distinguished from *justae nuptiae*, and was otherwise "gentile" marriage.

As has been already seen,[1] the distinction between the different modes of marriage disappeared during the Empire, and "gentile" marriage came itself to be recognised as constituting legal marriage (*matrimonium justum*) with all its consequent effects, and *connubium* then came to signify legal capacity generally to marry.

(a) *Physical Capacity to Marry*

It was requisite that both parties should be of a marriageable age, or otherwise have attained "puberty," which was fixed by the Roman Law at the age of twelve years in the case of females and fourteen years in case of males.[2] At these ages persons were presumed to have become physically capable of procreating children, which was assumed to be the primary intention of parties as well as mutual companionship,[3] and were said to have attained the age of "puberty," in respect of which they were styled *puberes*, as distinguished from those who had not yet attained that age, and were therefore called *impuberes*. Moreover, as marriage was a contract, it was essential that parties should have attained the age at which they could legally contract.

Although the law fixed a minimum age—that of puberty—below which persons could not competently contract marriage it yet did not fix a maximum age above which marriage was incompetent; so that old age was no disqualification for matrimony even although the parties had passed the recognised period of childbearing, for the law would not assume the absolute impossibility of procreation, however impossible it might appear.[4] Mere impotency, moreover, did not, by the Roman Law, invalidate a marriage, unless the condition, having been induced artificially as by castration, was absolute.[5]

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[1] *Ante*, p. 146.

[2] Justinian, *Inst.* i. 22 pr.; *Inst.* i. 10 pr.; *cf.* Gaius, *Inst.* i. 196; *Code*, v. 60, 3.

[3] See Roby, *Roman Private Law*, i. 127, and note 1 *ibid.* *Cf.* French Civil Code, Art. 144, by which the male must be eighteen and the female fifteen complete years. (See also Arts. 145 and 184.)

[4] *Cf.* on this point, Colquhoun, *Roman Civil Law*, i. 494, 584-588.

[5] *Dig.* xxiii. 3, 39, 1; *cf.* xxviii. 2, 6. *Cf.* also Roby, *Roman Private Law*, i. 131; Moyle, *Institutes*, 128; Mackenzie, *Roman Law*, 97.

(b) *Consent to Marry*

If the parties were not *sui juris* the consent required was twofold—(1) that of the parties themselves, and (2) that of the persons to whose *potestas* they were respectively subject.[1]

The consent of the parties required to be (*a*) mutual, (*b*) voluntary, and (*c*) serious.

Mutual consent implies that that of the woman was as essential to the constitution of the contract of marriage as that of the man.

The consent might be vitiated, and the contract rendered void, by reason of force or of fraud, for these elements are inconsistent with voluntary consent. Thus a father could not compel his children to marry,[2] although it was not considered, by the Roman Law, sufficient to vitiate a marriage if a child married contrary to his own wish out of respect for his parent, or in fear of the parent's threats.[3]

Consent given in error, under a mistaken belief reasonably entertained in the circumstances, might invalidate a marriage if it was of such a nature as to be essential, as where a person was excusably mistaken with regard to the actual identity of the other party; but a mistaken belief merely as to the qualities of the other party in respect of such matters as character, or age, or fortune, or rank, would not suffice to invalidate the consent and to vitiate the contract.

Serious consent implies that the parties understand the nature and effects of their acts; consequently a marriage would be void if the consent of either of the parties was given by one who was not in possession of full mental faculties by reason either of insanity, or of drunkenness, or of the action of drugs, or disease, or from any other cause. But a person suffering generally from insanity could validly, during a lucid interval, consent to marry, just as such a person could, at such times, validly perform other legal acts. In order that insanity should suffice to invalidate a marriage, it required to have existed at the time when the marriage was contracted; so that insanity supervening upon marriage would not dissolve the contract.[4]

If the parties to a marriage were not legally independent (*sui juris*), the consent of the persons to whose paternal authority they were respectively subject was an essential requisite;[5] and if the father was himself subject to *potestas* (*in potestate*), the consent of both the grand-

[1] *Dig.* xxiii. 2, 25; Justinian, *Inst.* i. 10 pr.
[2] *Dig.* xxiii. 2, 21; *Code*, v. 4, 14.
[3] *Dig.* xxiii. 2, 22.
[4] Paul, ii. 19, 7.
[5] Justinian, *Inst.* i. 10 pr.

father and himself was necessary, in the case of the marriage of sons.[1] The consent of the father or of the *paterfamilias* did not, however, require to be express, and might competently, in certain circumstances, be inferred from tacit acquiescence.[2] The consent of the mother was not requisite, nor was that of a guardian, because the legal necessity for consent was based upon the *patria potestas*,[3] which neither of these persons were capable of possessing with regard to the parties.

In certain circumstances the consent of the father was not requisite and might be dispensed with, as when he was insane,[4] or had been absent from home unheard of, or a captive in the hands of the enemy for three years;[5] or even if he witheld his consent unreasonably, in which last case, however, judicial dispensation was requisite.[6]

In the case of insanity the rule of law as to the consent of the *paterfamilias* to a marriage was very strictly construed until the time of the Emperor Marcus Aurelius, on the ground of an insane person's absolute incapacity to give any form of consent, to the effect of invalidating the marriage of sons who were in the *potestas* of a lunatic person (*mente captus*), or of a madman (*furiosus*).[7] Marcus Aurelius permitted the sons of a lunatic (*mente captus*) to marry without his consent,[8] and Justinian extended this privilege to the sons of persons suffering from acute insanity (*furor: furiosi*).[9]

SECTION 39.—IMPEDIMENTS TO MARRIAGE[10]

It was essential for the validity of a marriage that there should not be any legal impediment or obstacle to the union; in other words, it was requisite that the parties should have the legal capacity to marry,

[1] *Dig.* xxiii. 2, 16, 1. The reason for this was to be found in the rule that no one could have an heir forced upon him against his will (*Inst.* i. 11, 7). On the death of the grandfather the father acquired *potestas* over his children, and, if his consent were unnecessary, it might be that there would be entitled to share his property children subject to his *potestas* without his consent that they should be so (*cf.* Hunter, *Roman Law*, 681).

[2] Cf. *Code*, v. 4, 5.

[3] Consequently emancipated children did not require paternal consent (*Dig.* xxiii. 2, 25).

[4] Justinian, *Inst.* i. 10 pr.; cf. *Code*, v. 4, 25.

[5] *Dig.* xxiii. 2, 10; xxiii. 2, 9, 1.

[6] *Dig.* xxiii. 2, 19.

[7] The daughters of such persons were, even under the early law, permitted to marry, presumably because their children would come under the *potestas* of their husbands, and not that of their fathers.

[8] *Code*, v. 4, 25.

[9] Justinian, *Inst.* i. 1, 10 pr.; *Code*, i. 4, 28. See also on consents to marriage, Roby, *Roman Private Law*, i. 131, 132; Hunter, *Roman Law*, 4th ed., 680-681; Didier-Pailhé, *Droit Romain*, i. 41-43; May, *Éléments de Droit Romain*, 99, 102, 103. *Cf.* also French Civil Code, Arts. 144-160.

[10] See upon impediments to marriage generally, Roby, *Roman Private Law*, i. 127-132; Hunter, *Roman Law*, 682-688; Moyle, *Inst.*, 128, Commentary; Mackenzie, *Roman Law*, 97, 98.

which was signified, generally, by the term *connubium*.[1] Legal capacity to marry might be either absolute or relative; certain persons were wholly incapable of contracting a valid marriage, while others were merely prohibited from marrying certain persons.[2] Restrictions to marriage were imposed by law, or by statute upon either natural grounds, or upon considerations of public policy, or political expediency.

Amongst those persons who were absolutely incapable of contracting marriage were slaves, castrated persons (*castrati*), insane persons, those already married, and persons under "puberty"; also women unacquitted of the crime of adultery,[3] and female slaves manumitted by their masters in order to marry them, who thereafter refused to do so.[4] The marriage of a female *impubes*, however, became valid if after attaining puberty she continued to remain with the man as his wife.[5]

The Roman Law was a monogamous system, and did not permit any man to have more than one wife living at the same time, so that an existing marriage constituted an absolute legal impediment, so long as it subsisted, to the contraction of another marriage.

Relationship in too close a degree constituted an impediment to marriage, whether the relationship was by cognation or by agnation, or merely by "affinity" (*affinitas*).[6] The rules as to forbidden degrees applicable to persons related by cognation applied equally to those related by agnation; in the collateral line, however, persons related merely by agnation and not by consanguinity could competently marry after the tie of agnation was broken.[7]

Ascendants and descendants to the most remote degree could not marry each other; and this prohibition applied not only when the parties were related naturally by ties of blood, but even if the relationship was created civilly by the purely artificial process of adoption, in which latter case the prohibition subsisted even after the tie of adoption was dissolved; thus a man could not lawfully marry a woman who had once been his adopted daughter, even if he had subsequently emancipated her: such a union was regarded as incestuous.[8]

In the collateral line marriage was prohibited between persons within the third degree of relationship, or even beyond that degree if one of the parties stood in the position or ratio of a parent (*in loco parentis*) towards

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[1] Ulpian, *Frag.* v. 3. See also pp. 146, 147.
[2] *Cf.* Didier-Pailhé, *Droit Romain*, 43, 44. See also Section 38, p. 147.
[3] *Dig.* xxiii. 2, 26; xxiii. 2, 34, 1.
[4] *Dig.* xxiii. 2, 51 pr.
[5] *Dig.* xxiii. 2, 4.
[6] See on "Affinity," p. 152.
[7] *Dig.* xxiii. 2, 55, 1.
[8] Justinian, *Inst.* i. 10, 1; Gaius, *Inst.* i. 58, 59.

the other. Thus brothers and sisters, being in the second degree of relationship, could not marry, whether they were of the full or only of the half blood; and this prohibition extended to persons so related merely by adoption, in which latter case, however, the restriction operated only so long as the legal tie of agnation, artificially created by the adoption, subsisted.[1] So also marriage between an uncle and a niece, or an aunt and a nephew was illegal, for the law considered uncles and aunts as in the position of a parent (*in loco parentis*), and that they consequently came within the absolute prohibition against the marriage of ascendants and descendants; this prohibition was, moreover, extended to apply to collaterals of that class even although they were beyond the third degree, such as a grand-uncle or a grand-aunt.[2] It was, however, quite competent for a man to marry the daughter of a woman whom his father had adopted, for such daughter was not related to the man either naturally or civilly.[3]

In general, collaterals beyond the third degree of relationship could competently marry; thus marriage between first cousins—*i.e.* between brothers', or between brothers' and sisters' children, they being in the fourth degree—although at one time forbidden[4]—was declared legal by Arcadius and Honorius[5] (395 A.D.), and its legality was confirmed by Justinian.[6] Under the early law marriages had been prohibited between second cousins, even although they were only in the sixth degree of relationship to each other.

> The mode of estimating degrees of relationship, according to the Roman Law, was as follows:—As regards ascendants each generation counted one degree, so that, for example, from father to son was one degree, and from grandfather to grandson was two degrees, and so on; as regards collaterals, degrees were reckoned by first counting up to the common ancestor and then down again on the other side, or otherwise by adding together the number of degrees between each person and the common ancestor, so that, for example, brothers were in the second degree of relationship towards each other, each being one degree from the common parent, and first cousins were in the fourth degree, because each stood two degrees from the common ancestor, the grandfather.

AFFINITY.—Persons might be related to each other by "affinity"

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[1] Justinian, *Inst.* i. 10, 2; Gaius, *Inst.* i. 60, 61; *Dig.* xxiii. 2, 17, 1.

[2] Justinian, *Inst.* i. 10, 3; i. 10, 5; *Dig.* xxiii. 2, 39 pr.; xxiii. 2, 17, 2; Gaius, *Inst.* i. 62. *Cf.* French Civil Code, Art. 163; also Arts. 164, 184, 190, 201, 202.

[3] *Dig.* xxiii. 2, 12, 4; Justinian, *Inst.* i. 10, 3.

[4] Ulpian, *Frag.* v. 6.

[5] *Code*, v. 4, 19.

[6] Justinian, *Inst.* i. 10, 4; *Dig.* xxiii. 2, 3. See Roby, *Roman Private Law*, i. 128, note 1. The first recorded instance of marriage of first cousins appears to be in B.C. 171 (Livy, xlii. 34 3; Roby, *ut supra*).

(*affinitas*) within such a relative degree[1] as to be incapable of contracting a valid marriage.[2]

"Affinity" was the artificial legal relationship created by marriage between each spouse and the blood relations or kindred (*cognati*) of the other spouse.[3] "Affinity" was created, however, not only by marriage but also by both concubinage,[4] and *contubernium*, which last was the union of slaves,[5] and relationship by either blood or affinity that had arisen in a state of slavery was an impediment to the marriage of freed persons.[6]

> A stepfather, by reason of the tie of affinity, could not marry his stepdaughter, nor a stepmother her stepson,[7] nor could a father-in-law marry his daughter-in-law, nor a mother-in-law her son-in-law.[8] From the time of the Emperor Constantine, who abrogated the old law on the matter, a man could not lawfully marry his brother's widow, or his deceased wife's sister; and this enactment was repeated by the Emperors Valentinian, Theodosius, and Arcadius.[9]
>
> There was no illegality, however, in the marriage of parties who were the son and daughter respectively of a man and a woman who had each been married previously to another spouse before being married to each other; for such son and daughter were no natural relations to each other; it was, moreover, no bar to their marriage that their respective parents subsequently had children by their union who were related in common to both the son and the daughter of their previous marriages.[10]

Persons might be legally incapable of contracting marriage with each other, not on account of any actual incapacity, or relationship, but merely upon grounds of public policy, or political expediency. Thus difference of rank between the parties constituted an impediment in respect of which, under the law of the Twelve Tables, patricians and plebeians could not intermarry until the *Lex Canuleia* (B.C. 445) legalised such unions;[11] and freeborn persons could not marry freed persons until after the passing of the *Lex Julia et Papia Poppaea*, in A.D. 9.[12] This statute, however, amongst its other provisions, prohibited the

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[1] There were no actual degrees of affinity (*Dig.* xxxviii. 10, 4, 5).

[2] Justinian, *Inst.* i. 10, 6; Gaius, *Inst.* i. 63.

[3] *Dig.* xxxviii. 10, 4, 3.

[4] *Code*, v. 4, 4. On "Concubinage," see Section 50, p. 171.

[5] See *ante*, Section 22, pp. 104, 105.

[6] *Dig.* xxiii. 2, 14, 2, 3.

[7] Justinian, *Inst.* i. 10, 6; Gaius, *Inst.* i. 63.

[8] Justinian, *Inst.* i. 10, 7.

[9] *Code Theod.* iii. 12, 2; *Code Justinian*, v. 5, 5.

[10] Justinian, *Inst.* i. 10, 8. *Cf.*, on forbidden degrees, French Civil Code, Arts. 161-164.

[11] Livy, iv. 6.

[12] *Dig.* xxiii. 2, 23; Livy, xxxix. 19.

marriage of senators or their children with freed persons on account of the extreme disparity of their status,[1] and it also forbade the marriage of freeborn persons with women of reputedly bad character, or ignoble occupation.[2] The Emperor Constantine extended the prohibitory provisions of the *Lex Julia* to the effect of forbidding marriages of persons of high rank with free women of the lowest class.[3] Justinian repealed all restrictions based upon the ground of difference of rank between the parties, and persons of the highest rank of either sex might then marry those of the lowest station, whether free or freed, provided a dowry was fixed, or a marriage settlement was executed in writing.[4]

The *Lex Julia et Papia Poppaea* is usually referred to simply as the *Lex Julia*, and sometimes as the *Lex Caducaria* (see *ante*, p. 94, notes 4 and 5, and p. 95, note 3). It was a composite law, representing the final amended form of the original *Lex Julia de maritandis ordinibus* of B.C. 27 when that statute passed the Senate, and of B.C. 17 when it passed the *Comitia*, and of A.D. 4 when it was re-enacted; finally, in A.D. 9, a supplement to the original enactment was passed, in the Consulship of M. Papius and Q. Poppaeus, known as the *Lex Julia et Papia Poppaea*. It was really a matrimonial code, having as its object the prevention of *mésalliances*, and the encouragement of marriage, and the procreation of lawful children. For three centuries this codifying statute enjoyed an authority equal to that of the Twelve Tables, or of the consolidated Edict.[5]

The existence of a fiduciary relation operated, in certain circumstances, as an impediment to marriage; thus the governors of Roman provinces, and certain other high officials[6] and their sons were not permitted, during their period of office,[7] to marry natives of the territory subject to their administration, lest they should thereby be induced to abuse their authority; but a marriage contracted illegally by a high official in such circumstances became valid, and any children that were subsequently born were legitimate if the parties continued to live as married persons after the official had demitted office.[8] So also, upon the same grounds, guardians, whether tutors or curators, were prohibited by a *Senatus-Consultum* passed in the time of Marcus Aurelius

[1] *Dig.* xxiii. 2, 23; xxiii. 2, 44, pr. 1; xxiii. 2, 16 pr.
[2] *Dig.* xxiii. 2, 41; Ulpian, xiii. 1, 2.
[3] *Code*, v. 27, 1.
[4] *Nov.* 117, 6.
[5] See Muirhead, *Roman Law*, 285, 286.
[6] *Dig.* xxiii. 2, 63—viz. The Prefect of the Cohorts (*praefectus cohortis*), the Commander of the Cavalry (*praefectus Equitum*), and the Tribune (*Tribunus*).
[7] *Code*, v. 4, 6; *Dig.* xxiii. 2, 38 pr.
[8] *Dig.* xxiii. 2, 38 pr.; xxiii. 2, 57 pr.; xxiii. 2, 63; xxiii. 2, 67.

and Commodus (161-193 A.D.),[1] from marrying their wards, or from giving them in marriage to their sons before the wards had attained twenty-six years of age, unless the betrothal (*sponsalia*), or the marriage had been previously approved by the ward's father, either during his life or in his testament.[2]

> The object of the restriction upon guardians in respect of marriage was in order that they might not be enabled, through the exercise of their authority and their special relation towards the ward, to evade or limit their liability to account for their administration of the ward's property. The restriction included sons given in adoption, and also adopted sons; but a guardian was not prohibited from giving his daughter in marriage to his ward, or from giving in marriage to his son[3] the daughter of a female ward who had grown up and died before the guardian had rendered his accounts.

Upon grounds of public policy, conviction for crime, or religion might constitute an impediment to marriage. Thus a ravisher could not marry the woman he had violated,[4] because, by marrying her, he would have thereby re-acquired the property he had forfeited by law to the woman he had wronged. An adulterer could not marry the woman with whom he had committed adultery,[5] and the same rule was applied in cases of abduction.[6]

By a law passed in A.D. 388, a marriage between a Christian and a Jew was illegal, and persons contracting such a union were guilty of the crime of adultery.[7]

The relation of patron and freedman might, in certain circumstances, be a bar to marriage, for although a male patron was entitled, but not encouraged, to marry his freedwoman,[8] a female patron could not legally marry her freedman, and a freedman could not marry the wife, or the daughter, or the granddaughter of his patron.[9]

An impediment to marriage might also be created in circumstances where, far from there being a bond of either cognation or agnation between the parties, there was not even that of affinity, but merely a relationship analogous to that of affinity, which was considered a sufficient bar to marriage. Thus a man could not marry the daughter of

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[1] *Dig.* xxiii. 2, 67, 3.

[2] *Dig.* xxiii. 2, 66; xxiii. 2, 36. See also *Dig.* xxiii. 2, 59; xxiii. 2, 60; xxiii. 2, 62; xxiii. 2, 64.

[3] Roby, *Roman Private Law*, i. 131, and references cited *ibid.*

[4] *Code*, ix. 13, 2; *Nov.* 143; *Nov.* 150.

[5] *Dig.* xxxix. 9, 13; *Nov.* 134, 14.

[6] *Code*, ix. 13, 1; *Nov.* 143, 150.

[7] *Code*, i. 9, 6.

[8] *Dig.* xxv. 7, 1 pr.; *Code*, v. 4, 15.

[9] *Code*, v. 4, 3.

his divorced wife by another man, although such a person was not his stepdaughter;[1] nor could a man marry the woman who was merely betrothed to his son, or the woman who was betrothed to his father;[2] further, it was incompetent for a man to marry the widow of the man who had been his father merely by adoption, because such a woman was towards him in the position or relation of a stepmother;[3] and a man could not legally marry the widow of his adopted son, because she was in the position of a stepdaughter towards him.[4]

So long as the distinction between "Latins" (*Latini coloniarii*) and "citizens" (*cives*) subsisted, a Roman citizen could not validly contract *justae nuptiae* with a female "Latin," or a female peregrin without special permission,[5] to the effect of creating *patria potestas* and the usual results of regular marriage, for there was not *connubium* between such persons. But such a union was valid under the name of *matrimonium* to the extent of rendering the children legitimate, and the parties guilty of adultery if they were unfaithful.[6]

SECTION 40.—EFFECTS OF MARRIAGE

Lawful marriage had a twofold effect; it affected (1) the spouses and (2) the children.

As regards the spouses, both their persons and their property were affected. With regard to their persons, mutual obligations of help and fidelity were created,[7] and a violation of the latter duty subjected both parties to penalties more or less severe.

As regards each spouse in particular, the husband acquired by marriage a legal right to his wife's companionship and society, which he could insist upon by action at law if deprived of it.

The wife became entitled by marriage to the protection of her husband, and to be supported by the husband at least so far as the dowry, if any, sufficed;[8] moreover, she acquired her husband's rank[9] and domicile, and assumed his name, and she could legally continue to retain his name and rank after her husband's death so long as she herself remained unmarried.

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[1] Justinian, *Inst.* i. 10, 9.

[2] *Inst.*, *ut supra.*

[3] *Dig.* xxiii. 2, 14 pr.

[4] *Dig.* xxiii. 2, 14, 1.

[5] This was frequently granted to veterans as a special privilege and reward (Gaius, *Inst.* i. 57).

[6] *Dig.* xlviii. 5, 13 pr., 1. The wife in such a union was known as *injusta uxor.*

[7] *Cf.* French Civil Code, Art. 212.

[8] *Cf. Dig.* xxiv. 3, 22, 8. See, further, on wife's right to maintenance, p. 157, also p. 143.

[9] *Code*, x. 39, 9.

The effect of marriage upon the property of the parties differed according as the marriage was contracted with or without *manus*. When the marriage had been attended with *conventio in manum* by being contracted in one or other of the ways, that have already been considered,[1] requisite to constitute "regular" marriage (*justae nuptiae*) under the older law according to the strict *jus civile*, and to give rise to the special legal and family rights thereby created, the wife passed from her own family and from under the *potestas* of her own father into the family and under the power of her husband to the same effect as if she were his daughter, and she was placed in a position of entire subjection to her husband's authority as regards both her person and her property;[2] but she acquired, on the other hand, the same rights of succession as other persons under *potestas*. When, however, "free" marriage, or marriage without *manus* (*matrimonium jure gentium*), came in later times to be usual, and to supersede marriage with *manus*, it had no effect upon the property of the spouses, and did not render it common to both; neither spouse by marriage acquired thereby any rights in the property of the other during life, but each retained and could dispose of his or her own property as they chose, except in so far as the property of both spouses had been dealt with and settled by way of a dowry (*dos*) or of a *donatio propter nuptias*.[3] If the wife was *sui juris* her private property was entirely distinct and separate from that of her husband; she could deal with it as she pleased, and her husband could only administer it as her agent, actual or implied, and in virtue of her mandate or authority. Although it is nowhere in the Roman Law expressly so stated, it may be inferred that the husband was probably not legally bound to maintain his wife, to the effect of entitling her to claim maintenance at his hands by an action at law, unless a dowry had been provided, in which case he could be compelled to support her out of it so far as it sufficed.[4] The husband was not liable upon contracts made by his wife, except in so far as they were reasonably entered into by her for domestic purposes in her capacity as household manager (*praeposita negotiis domesticis*). Both spouses acquired by marriage a right of succession to the other on intestacy, failing cognate relations entitled to take in such circumstances.

The effects of marriage as regards the children were that they acquired the status of legitimacy, the legal status and rank of their

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[1] *Ante*, p. 143.

[2] Gaius, *Inst.* ii. 96-98.

[3] See *post*, Sections 41 and 46.

[4] *Dig.* xxiv. 3, 22, 8. See upon the liability of a Roman husband to support his wife, Hunter, *Roman Law*, 679.

father,[1] and the relationship of cognation on both the paternal and maternal sides, which gave rise to corresponding obligations of upbringing and of filial duty (*reverentia*), and reciprocal duties of support. The most important effect, however, was the creation of the civil relationship of agnation,[2] with its various consequences, but specially those with regard to rights of succession and of guardianship.

In terms of a maxim of the Roman Law to the effect *Pater is est quam nuptiae demonstrant*,[3] the husband of a woman was regarded as the father of all the children who were conceived during the marriage. A child was considered as having been conceived during the marriage of two given parties if it was born not more than ten months after its dissolution.[4] A child was regarded as capable of having been conceived during a particular marriage if it was born after the commencement of the seventh month, or the one hundred and eighty-first day after the marriage was contracted, until the end of the tenth month, or the three hundred and first day after the dissolution of the marriage; these periods were considered by the jurists as having been shown by experience to be respectively the shortest and the longest periods of human gestation. Within these limits of time a child was presumed to be the offspring of the marriage, but it was open to the husband to rebut the presumption, and to disclaim the paternity by proving that he was physically incapable of cohabiting with his wife during the period in question by reason of any cause, such as absence or illness.[5]

SECTION 41.—DOWRY (DOS)

The *dos* or "dowry" was property contributed by a bride, or by some person on her behalf towards the expenses of the married life of the parties.[6]

A *dos* was only competent in the case of a lawful marriage,[7] and though usually given, or promised. before marriage, could be both either first given, or increased, after the marriage had been contracted;[8] as was also the case with regard to the corresponding matrimonial contribution provided by the husband known as the *donatio propter nuptias*.[9]

The provision of a *dos* or dowry was not essential to the validity of a Roman marriage; but it was considered to be the duty of a Roman

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[1] Ulpian, v. 8.
[2] See *ante*, Section 28, p. 121.
[3] *Dig.* ii. 4, 5.
[4] *Dig.* xxxviii. 16, 3, 11. *Cf.* French Civil Code, Arts. 312-315.
[5] *Cf.* French Civil Code, Art. 312.
[6] *Ad matrimonii onera ferenda.* *Cf.* French Civil Code, Art. 1540.
[7] *Dig.* xxiii. 3, 3; 23, 3, 56, 1.
[8] *Code*, v. 3, 19; *cf.* Justinian, *Inst.* ii. 7, 3.
[9] *Code*, v. 3, 20; *cf. Inst.* ii. 7, 3.

father to give his daughter a marriage portion if he was in a position to do so, and this duty could be legally enforced.[1] A woman had a legal claim for a *dos* against her father, or other male paternal ascendant, whether she was in his *potestas* or not, based upon the *Lex Julia et Papia Poppaea* and various Imperial "constitutions."

A *dos* provided by a person who was under a legal obligation to provide one was known as *dos profectitia*.[2]

A woman was never herself bound to provide a *dos*, and a mother could only be compelled to do so, after an enactment of the Emperors Diocletian and Maximian, in special and exceptional circumstances.[3]

The *dos* was a very ancient legal institution, but its origin and history is uncertain. It is considered, by some authorities, to have been of the nature of a composition paid by the father of the bride to the husband in satisfaction of his former legal liability to maintain his daughter; for, after marriage without *manus* became usual, the wife, if she were not *sui juris*, remained under the power (*in potestate*) of her own *paterfamilias*, who consequently continued liable to maintain her notwithstanding her marriage.

On the other hand, the institution of the *dos* is referred, by various writers, to the peculiar proprietary relations existing between a husband and wife under the Roman Law; when a marriage was accompanied by *conventio in manum* the wife and all her property passed absolutely to the husband, but if the marriage was "free," without *manus*, the wife, as has been already explained,[4] did not pass under her husband's power, and, if *sui juris*, she continued to retain her own property absolutely separate from that of her husband,[5] who, nevertheless, was legally burdened with all domestic expenses, and the cost of the rearing and maintenance of the offspring of the marriage. In view of this liability laid by law upon the husband, the *dos* may be considered as having originated by way of an equitable contribution on the part of the wife, or of some one on her behalf, towards the common burdens of the married life of the parties.

SECTION 42.—VARIETIES OF DOS

A *dos* might be given by the father of the wife, or by some other male paternal ascendant, or be provided by the wife herself out of her own property, or be contributed by some third person other than a male paternal ascendant. In each of these cases the *dos* was distinguished by a particular name. If the *dos* was given by the father or

[1] Under the terms of the *Lex Julia de fundo dotali* (A.D. 18).

[2] See varieties of "*Dos*," Section 42.

[3] *Code*, v. 12, 14.

[4] *Ante*, p. 146.

[5] See "Effects of Marriage," *ante*, Section 40, p. 156.

some other male ascendant who was under a legal obligation to provide one it was known as *dos profectitia*;[1] if the *dos* was given by the wife herself out of her own property, or by a third person other than a male paternal ascendant, it was styled *dos adventitia*;[2] when, however, a *dos* was provided by a third person other than a male ascendant subject to an express condition or stipulation that it should revert to him, or to some other person, on the dissolution of the marriage, it was called *dos receptitia*, which was thus a special form of *dos adventitia*.

SECTION 43.—MODES OF CONSTITUTING DOS

A *dos* was usually constituted in one of three ways: it might be (1) given, or (2) declared, or (3) promised,[3] and these modes were known, respectively, as *dotis datio*, *dotis dictio*, and *dotis promissio*. There was said to be *dotis datio* when the property composing the *dos*[4] was actually handed over to the husband at the time when the agreement regarding it was made; *dotis dictio* was the constitution of the *dos* by means of a simple promise to give at a future date, made informally at the time of betrothal (*sponsalia*), in accordance with ancient custom, and by an ancient form of verbal contract which ultimately became obsolete, by the bride, or by her debtor, or by the male paternal ascendant in whose power she was; *dotis promissio* was a promise to give a *dos* at a future date, fortified by a solemn stipulation, upon which an action might be brought, and was the usual form employed when the *dos* was not handed over at the time of the agreement regarding it.

These forms, however, although the usual, were not the only modes of constituting a *dos*, which might, for example, be constituted by *acceptilatio*.[5]

Until the time of the Emperors Theodosius and Valentinian a mere promise to give a dowry could not be enforced unless it was fortified by the form of a "stipulation," in which case an action lay upon the words of the stipulation and not upon the promise itself. The Justinianian Law, however, following a provision of the law of Theodosius and Valentinian, held that an informal promise to give a *dos*, unfortified

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[1] *Dig.* xxiii. 3, 5 pr.

[2] Ulpian, *Reg.* vi. 3.

[3] "*Dos aut datur, aut dicitur, aut promittitur*": Ulpian, vi. 1; xi. 20.

[4] The *dos* might consist of any kind of property whereby the property of the husband (or of his *paterfamilias* if he was not *sui juris*) was increased, whether corporeal, or incorporeal, such as rights of ownership, rights of usufruct, personal rights, or even release of a debt.

[5] See, on modes of constituting *dos*, Sohm, *Inst.*, 3rd ed., p. 466; Roby, *Roman Private Law*, i. 139, 140.

by a stipulation, was itself enforceable by an action at law as a *pactum legitimum*.[1]

A *dos* was thus constituted, according to the law of Justinian, either by actual immediate delivery of the property to the husband (*dotis datio*), or by a promise, either formal or informal, to give the property at a future time (*dotis promissio*, or *dotis dictio*).

The *dos* was most usually, although not necessarily, constituted before the marriage took place; under the law of Justinian a *dos* might not only be increased, but might even be first given during the subsistence of the marriage.[2] A *dos* given before marriage, however, was conditional upon the marriage in respect of which it was given taking place.[3]

SECTION 44.—HUSBAND'S RIGHTS IN THE DOS

Under the Justinianian law the husband was entitled to the control and management of the *dos* and its fruits during the subsistence of the marriage;[4] and, in so far as it consisted of "fungibles," or things ordinarily reckoned by number, weight, or measure, and replaceable by things of the same kind,[5] he could exercise full rights of ownership, subject, however, to an obligation upon himself, or his heir, to restore the same kind of things, of the same quantity, quality, and value,[6] within a year after the dissolution of the marriage.[7] If, however, and in so far as the *dos* consisted of immovables, or was invested in land or houses, the husband could neither dispose of nor burden the property even with his wife's consent,[8] and he had to restore it immediately upon the dissolution of the marriage.[9] Justinian allowed the husband to deduct from the amount of the *dos* expenses necessarily incurred in the preservation of the property composing the *dos* (*impensae necessariae*); but he was liable to pay compensation for any injury to the dotal property through lack of sufficient care on his part, or if he had alienated any of the movables.

Originally the husband was the legal owner of the *dos*, and as such he was entitled not only to enjoy its fruits and income but to dispose of it as he pleased. The encouragement which this would afford to

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[1] See "Obligations," *post*, Part IV.

[2] Justinian, *Inst.* ii. 7, 3; *Code*, v. 3, 19, 20; Vat. Frag. 110.

[3] Paul, *Sent.* ii. 22, 1.

[4] *Cf.* French Civil Code, Art. 1549.

[5] See Part III., Section 67 (*d*).

[6] *Dig.* xxiii. 3, 42.

[7] Ulpian, *Reg.* vi. 8. The period was three years until altered to one year by Justinian (*Code*, v. 13, 1, 7). *Cf.* French Civil Code, Arts. 1564, 1565, and 1551, 1552.

[8] Justinian, *Inst.* ii. 8 pr. *Cf.* French Civil Code, Art. 1554.

[9] *Cf.* French Civil Code, Art. 1564.

improvidence on the part of the husband was restricted by legislation; thus the *Lex Julia de adulteriis et de fundo dotali* (18 B.C.) prohibited the husband from selling immovable property in Italy that formed part of the *dos* without his wife's consent, or from mortgaging such property even with her consent. Justinian subsequently extended the prohibition to the alienation or burdening of any immovable part of the *dos*, whether situated in Italy or in the provinces, and whether or not the wife consented.[1]

The husband's rights in the *dos* may be said, speaking generally, to have become, by the time of Justinian, merely a life interest during the subsistence of the marriage, and which terminated on the dissolution of the marriage whether by death or by divorce, when the husband had to restore the *dos;* except in the case of the marriage being dissolved by divorce by reason of the wife's misconduct, or on the part of the wife by divorcing the husband without reason assigned, in which two latter cases the husband became either actual owner, or only usufructuary of the *dos* according as there were not or were children of the marriage.[2]

The whole tendency of the development of the law with regard to the *dos* was to restrict the rights of the husband in the *dos* to a mere right of enjoyment during the subsistence of the marriage; so that, apart from dissolution of the marriage by divorce on the ground of the wife's misconduct, or by divorce of the husband by the wife without reason assigned, the surviving husband, under the law of Justinian, had no right to the *dos* on the dissolution of the marriage, and had then to restore it according to the general rules of the devolution of the *dos*[3] failing express agreement otherwise. Under the later Justinianian law the *dos* was only in form the property of the husband, but was in substance the property of the wife, it having come by that time to be recognised by the law as really a portion of the wife's property (*res uxoria*) entrusted to the husband for a limited period, namely that of the subsistence of the marriage.[4]

SECTION 45.—DEVOLUTION OF THE DOS

The devolution of the *dos* under the law of Justinian might differ according as the marriage was dissolved by death or by divorce.

If the marriage was ended by the predecease of the husband, the *dos profectitia* and *dos adventitia* went to the wife if she was *sui juris*, or to her father if she was *in potestate*, and they both had to unite in claiming it;[5] *dos receptitia*, in such a case, reverted to the donor according to the

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[1] Justinian, *Inst.* ii. 8 pr. *Cf.* Gaius, *Inst.* ii. 62, 63; *Code*, v. 13, 15.

[2] *Code*, v. 12, 24; cf. *Code Th.* iii. 16, 2. Originally the husband's right in such a case was only to a part, but under the later law it was extended to the whole, of the *dos*.

[3] See Section 45.

[4] See Sohm, *Inst.*, 3rd ed., p. 472. *Cf.* Mackenzie, *Roman Law*, 102, and note 2.

[5] *Dig.* xxiv. 3, 2, 1.

condition upon which it had been given. A wife who survived her husband was entitled to the return of the *dos adventitia*, which before the time of Justinian she might obtain by means of either an *actio rei uxoriae* or by an *actio ex stipulato* if the husband had expressly stipulated to return it. Justinian substituted for the *actio rei uxoriae* an action based upon an implied stipulation, allowing the husband at the same time to deduct necessary expenses which he had incurred in connection with, and for the preservation of the dotal property.[1] A wife or her heirs also possessed, under the Justinianian law, a tacit or implied hypothec over the property of the husband in security of the return of the *dos*.[2]

If the marriage was dissolved by the death of the wife, *dos profectitia* reverted to the paternal ascendant who had provided it, if still surviving, failing whom it went to the heirs of the wife; but it could not be claimed by the donor's heirs. *Dos adventitia* went to the heirs of the wife in the absence of a special agreement to the contrary, while *dos receptitia* devolved in accordance with the agreement regarding it.

> Prior to Justinian, *dos profectitia* reverted, on the death of the wife, to the donor, subject to the retention of one-fifth in respect of each child of the marriage, but if the donor was not surviving at the time of the dissolution of the marriage the husband had right to it.[3] Under the Justinianian law the husband who survived his wife did not thereby acquire any right in the *dos*, which reverted to, and could be claimed, without any deduction in respect of children of the marriage, by the donor, or by the heirs of the wife according as it was *dos receptitia*, or *dos profectitia*, and as the donor was or was not surviving, or as it was *dos adventitia*.[4]

If the marriage was dissolved by divorce the general rule was that, unless it was terminated by reason of the misconduct of the wife, or by the wife divorcing the husband without reason assigned, the *dos* devolved as if the marriage had been dissolved by the wife's death; *dos adventitia* and *profectitia*, therefore, went to the wife, or to her father if she were in his power, while *dos receptitia* reverted in accordance with the condition upon which it was given. If, however, the marriage was dissolved through the fault of the wife, whether by reason of misconduct or by failure to adduce reason for divorce, the husband was entitled, under the Justinianian law, to the *dos adventitia* and *profectitia*, either absolutely or only for life according as there were not or were any children of the

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[1] Justinian, *Inst.* iv. 6, 37; *Dig.* xxiv. 3, 12, 14; xxv. 1, 5. See on "necessary" as distinguished from "useful" expenditure, Roby, *Roman Private Law*, i. 151.

[2] *Code*, v. 13, 1, 1. See "Hypothec," *post*, Part IV., "Obligations."

[3] Vat. Frag. 120.

[4] *Code*, v. 13, 1, 5, 6; v. 13, 1, 13.

marriage.[1] All property belonging to the wife that was not included in the dowry (*dos*), whether acquired before or after marriage, was known as "paraphernal" property (*parapherna*); it remained the separate property of the wife, and the husband had no rights in or over it except such as his wife might choose to accord him.[2]

Section 46.—Donatio ante Nuptias

This was originally and strictly a gift or settlement made by a prospective husband to his betrothed wife by way of a provision for the maintenance of his wife in the event of her surviving the dissolution of the marriage by reason either of his death, or of divorce on account of his misconduct, and for the mutual benefit of the spouses during the subsistence of the marriage.[3]

This donation or contribution on the part of the husband towards the matrimonial expenses of the spouses corresponded to the *dos* contributed by the wife, or by someone on her behalf, and was regarded as a form of equivalent or return.[4]

Originally the *donatio ante nuptias* was essentially ante-nuptial, and could only competently be given before marriage (*ante nuptias*), for the Roman Law for long forbade post-nuptial gifts between husbands and wives.[5] The Emperor Justin, the predecessor, uncle, and adoptive father of Justinian, permitted ante-nuptial donations to be supplemented after marriage, and the Emperor Justinian went still further and permitted such provisions to be even constituted for the first time after marriage; but, because the name *donatio ante nuptias*, or pre-nuptial gift, became thereby somewhat inaccurate, there was substituted for it that of *donatio propter nuptias*, or gift "in respect of" or on account of marriage.[6]

The *donatio ante nuptias* was conditional upon the contemplated marriage in respect of (*propter*) which it was given taking place, and it was not intended to be effective until that event happened, just as in

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[1] See "Husband's Rights in *Dos*," *ante*, Section 44, p. 161.

[2] *Dig.* xxiii. 3, 9, 3; *Code*, v. 14, 11. See upon *Dos*, Sohm, *Inst.*, 3rd ed., 465-472; Moyle, *Inst.*, 4th ed., 131, 132; Sandars, *Inst.* 151, 152; Mackenzie, *Roman Law*, 7th ed., 101, 102; Hunter, *Roman Law*, 4th ed., 295-308, 679; Roby, *Roman Private Law*, i. 136 *et seq.*; Leage, *Roman Private Law*, 92-96; Girard, *Manuel de Droit Romain*, 926-941; May, *Éléments de Droit Romain*, 340-353; Didier-Pailhé, *Droit Romain*, 4th ed., i. 257-268; Cuq, *Institutions Juridiques des Romains*, i. 229-234.

[3] Cf. Sohm, *Inst.* 473.

[4] It was thus sometimes called *antipherna*, i.e. *antidos* (*Code*, v. 3, 20, 2). See also Muirhead, *Roman Law*, 2nd ed., 388. Cf. *Code*, v. 3, 20 pr.

[5] *Dig.* xxiv. 1, 1 pr.

[6] Justinian, *Inst.* ii. 7, 3; *Code*, v. 3, 19, 20.

the case of the *dos;* it was regulated by rules similar to those governing the *dos*, and, like the *dos*, it was secured from the claims of creditors.

The *donatio propter nuptias* was the property of the wife, given to her for the specific ultimate purpose of providing for her maintenance if she survived the dissolution of the marriage by reason either of the death of the husband or of his divorce owing to misconduct.

During the subsistence of the marriage the husband had control and management of all the property included in the *donatio propter nuptias.* He might competently apply the fruits or income of the property towards the matrimonial expenses, but he could not alienate the *donatio*, in so far as it consisted of immovables, even although his wife consented.

The wife had a tacit hypothec over the husband's property in security of the *donatio propter nuptias*, and Justinian also gave to a wife a "real" action or "vindication" (*vindicatio*) for the recovery of property included within the provision.[1] In the event of the husband's insolvency the wife was entitled to demand the immediate transfer of the *donatio propter nuptias.*[2]

If the marriage was dissolved by the death of the wife, or by her divorce for misconduct the *donatio ante* (or *propter*) *nuptias* reverted to the husband absolutely; but if the marriage was terminated by the death of the husband, or by his divorce for misconduct, the wife was entitled to the *donatio ante nuptias* as her absolute property, unless there were children of the marriage, in which case she got the usufruct of the property and shared the *dominium* of it with them.[3]

Under the legislation of Justinian the value of the *donatio propter nuptias* had to be equivalent to that of the *dos*,[4] and wherever a *dos* was given, or promised, or supplemented on behalf of the wife a *donatio* required to be correspondingly given, promised, or increased on the part of the husband. Moreover, under the later law, the *paterfamilias* of the husband was, by a constitution, put under a legal obligation to provide a *donatio propter nuptias* similar to that imposed upon the *paterfamilias* of a bride to provide a *dos.*[5]

The *donatio* from the husband in fact supplied the means whereby the wife might provide a *dos;* it was frequently returned to the husband

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[1] *Nov.* lxi. 1.

[2] *Code*, v. 12, 29.

[3] See Mackenzie, *Roman Law*, 102; Hunter, *Roman Law*, 693; *Nov.* 117, 9. But see Moyle, *Inst.* 236, to the effect that the surviving wife, without issue, had no claim to the *donatio ante nuptias* in the absence of express agreement. This view, however, would seem to defeat the true object of the constitution of the *donatio.*

[4] *Nov.* 97, 1, 2.

[5] *Code*, v. 11, 2.

as *dos* which, as such, was the wife's own property which she could claim on the dissolution of the marriage. It is in view of this that Justinian states that the *donatio propter nuptias* was both in name and fact the same as the *dos*, the one being correlative to the other.[1]

The *donatio ante nuptias* was of much later origin than the *dos*, and is only mentioned for the first time in a Constitution of Theodosius and Valentinian of 449 A.D.,[2] by which the *donatio* as well as the *dos* was to be liable to forfeiture on account of divorce without sufficient cause; but the *donatio ante nuptias* is even there referred to as if it were an already recognised legal institution.[3]

SECTION 47.—GIFTS BETWEEN HUSBAND AND WIFE (DONATIONES INTER VIRUM ET UXOREM)[4]

It was for long a rule of the Roman Law, based upon custom, that gifts between husband and wife given during marriage were void and of no effect; the reason advanced by the jurists for the existence of this rule was a desire to avoid the risk of the spouses impoverishing each other owing to excess of mutual affection, and also a desire to preserve the purity of the married state by preventing the contraction of marriages in the mere expectation of gifts, which hope, if unrealised, might induce domestic discomfort and even divorce.[5]

The rule only applied in the case of lawful marriage, and when the gift was of such value as to materially impoverish the giver, and when it was intended to take effect during the subsistence of the marriage. Consequently a gift by a husband or a wife to the other spouse that was only intended to become operative after the dissolution of the marriage, as in the event of death, divorce,[6] or exile,[7] was valid, and did not fall within the prohibition; nor did gifts between persons betrothed, provided they were actually given before marriage, and in the event of the contemplated marriage not taking place, or even if it did follow, such a gift could not be reclaimed unless that had been an express condition attached to the gift.

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[1] *Code*, v. 3, 20 pr.

[2] *Code*, v. 17, 8, 4.

[3] See upon the *donatio ante* (or *propter*) *nuptias*, *Code*, v. 3; Justinian, *Inst.* ii. 7, 3; Sohm, *Inst.*, 3rd ed., 473; Moyle, *Inst.*, 4th ed., 235; Sandars, *Inst.* 152; Mackenzie, *Roman Law*, 7th ed., 102; Muirhead, *Roman Law*, 2nd ed., 388; Hunter, *Roman Law*, 4th ed., 309; Girard, *Manuel de Droit Romain*, 941; Didier-Pailhé, *Droit Romain*, i. p. 268; May, *Éléments de Droit Romain*, p. 353.

[4] *Dig.* xxiv. 1.

[5] *Dig.* xxiv. 1, 1, 2.

[6] Presumably *mutual* divorce upon such grounds as priestly office, barrenness, old age, health, or military service (cf. *Dig.* xxiv. 1, 60-62).

[7] *Dig.* xxiv. 1, 43; xxiv. 1, 13, 1.

From the time of the Emperor Alexander Severus (A.D. 193-211) the rigidity of the rule regarding gifts between spouses became relaxed, and under the law of Justinian donations between husband and wife were no longer void; such gifts could then competently be made, but they were voidable, and the giver could revoke the gift at any time during the subsistence of the marriage; if, however, the donor predeceased the donee without having revoked the gift it became thereby effectual and irrevocable on the part of the donor's heirs.

There were, indeed, certain gifts of a special character made between husband and wife which were immediately valid and irrevocable, such as those given by way of remuneration for services rendered, or made by either spouse in view of divorce or exile,[1] or those given by a wife to her husband specially to qualify him for, or to maintain the dignity of certain public offices.[2]

SECTION 48.—DISSOLUTION OF MARRIAGE

A Roman marriage might be dissolved or terminated by death, divorce, slavery, or loss of citizenship.[3] Under the old law, moreover, marriage with *manus* was dissolved by the *capitis deminutio minima* of either of the parties. Marriage might also be dissolved by reason of the emergence of incestuous circumstances,[4] as, for example, if a man were to adopt as his son the husband of his daughter.[5]

Under the later law slavery resulting from captivity did not dissolve a marriage; the captivity was regarded as mere absence, and, consequently, proof of the death of the absentee was requisite in order to entitle the remaining spouse to contract another marriage.[6] This was the ultimate modification of the rule of the earlier law, which was to the effect that, although captivity did not dissolve a marriage the recovery of liberty did not, by operation of *postliminium* (*jure postliminii*), revive the married relationship, to the renewal of which the parties had to give a fresh consent.[7]

(a) *Dissolution of Marriage by Death*

According to the definition of the law, marriage was a contract by which a man and a woman undertook, in certain ways prescribed by

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[1] See notes 6 and 7, *supra*, p. 166.

[2] See upon gifts between husband and wife, Roby, *Roman Private Law*, i. 159 *et seq.*; Sohm, *Institutes*, 3rd ed., 464, 473; Moyle, *Institutes*, 4th ed., 234; Mackenzie, *Roman Law*, 7th ed., 103; Girard, *Manuel de Droit Romain*, 2nd ed., 919.

[3] *Dig.* xxiv. 2, 1. But loss of citizenship did not *ipso facto* dissolve a marriage; it merely gave ground to the other party to do so if he or she so desired (*Code*, v. 17, 1).

[4] *Incestus superveniens.*

[5] Cf. *Dig.* xxiii. 2, 67, 3.

[6] *Nov.* 117, 11.

[7] *Dig.* xlix. 15, 14, 1. *Cf.* Roby, *Roman Private Law*, i. 133.

the law, to live together as husband and wife for the rest of their lives. The natural mode of termination of this contract was thus the natural death of one of the parties.

A woman whose marriage had been dissolved by the death of her husband, or by divorce, was bound, under liability to incur "infamy" and other penalties, to let a year elapse before contracting another marriage.[1]

(b) *Dissolution of Marriage by Divorce*

Divorce is the dissolution of the contract of marriage in the lifetime of both the parties.

Divorce always existed amongst the Romans from the earliest times, but for very long it was seldom employed; by the end of the Republican Period, however, in the general corruption of public morals which had then come to prevail, it became so excessively common as to constitute a very serious social danger and a real source of social and racial degeneration, and various laws were passed with a view to check the evil.

Divorce, in the view of the Roman Law, and contrary to that of most modern and European systems, was a purely private act between the parties for the completion of which the intervention of a judge or the decree of a legal tribunal was not requisite.

Divorce operated by the consent of the parties alone, and that consent might be either (*a*) mutual, or (*b*) on the part of only one of the parties. Mutual divorce, by the consent of both parties, was known as *divortium*, while divorce effected by the will of only one of the parties was distinguished as *repudium* or "repudiation," and this latter method was as available to the wife as to the husband.[2]

Divorce, as specially understood by Roman Law, may consequently be defined as the dissolution of a lawful marriage in the lifetime of both parties by the will of both or either of them. The mode of dissolution of the marriage by divorce corresponded with the mode by which it had been constituted, so that a *jus civile* marriage created by "confarreation" was dissolved by "diffareation," which was another formal and similiar religious sacrifice and ceremony to the contrary effect, and a marriage constituted by co-emption or a fictitious sale was terminated by "re-mancipation" or a re-sale. In the same way marriages constituted under the later law, after marriage with *manus* had become

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[1] *Code*, v. 17, 8, 9; *Nov.* 22, 16 pr. *Cf.* French Civil Code, Art. 228.

[2] *Divortium* was sometimes employed to signify generally dissolution of marriage at the instance of either or both parties, and *repudium* as connoting the written "bill of divorce" (*libellus repudii*). See Hunter, *Roman Law*, 689.

obsolete, by mere consent were also dissolved by mere consent, either mutually or by the will of one of the parties.[1]

Besides being terminated by the will of the parties themselves, a Roman marriage could also be dissolved by the *paterfamilias* of the wife, if she had not passed into the *manus* of her husband and had not been emancipated, even against the wish of both her and her husband: the Emperor Antoninus Pius, in a "Constitution," prohibited the exercise of this power in the case of well-assorted marriages, and the Emperor Marcus Aurelius further qualified the prohibition by permitting the exercise of the power only in cases when there was serious and good ground for doing so.[2]

The essential element in a Roman divorce was the consent of the parties, whether of one or both of them, without the necessity of any judicial procedure or decree; but the laws enacted during the period of the later Republic and that of the Empire in order to regulate and limit the excessive freedom of divorce endeavoured to accomplish their purpose by imposing penalties not only upon the spouses who gave good ground for divorce, but also upon parties who divorced each other by mutual consent without good and sufficient cause. The penalties usually involved forfeiture of the marriage contract, or other matrimonial provisions such as the *dos* or the *donatio propter nuptias.*

Mutual divorce (*divortium bona gratia*) was practically prohibited by the legislation of Justinian by reason of the excessive severity of the penalties attached to it,[3] but his successor repealed the prohibitive penalties, and restored the competency of mutual divorce.[4]

Divorce by one of the parties without the consent of the other required no special formalities[5] until the *Lex Julia de adulteriis*[6] prescribed that the serious intention[7] of one party to divorce the other should be expressed and evidenced in a document or "letter of repudiation"[8] delivered by a freedman of the family in the presence of seven Roman citizens above puberty;[9] following upon which the written record of the marriage[10] was destroyed, and the fact of the divorce (*repudium*) was recorded in a public register.[11]

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[1] *Cf.* Sohm, *Inst.*, 3rd ed., 475.
[2] *Code*, v. 17, 5.
[3] *Nov.* 117, 10-12; 134, 11.
[4] *Nov.* 140, 1.
[5] *Dig.* xxxviii. 11, 1.
[6] B.C. 17.
[7] Cf. *Dig.* xxiv. 2, 3.
[8] *Libellus repudii.*
[9] *Dig.* xxiv. 2, 9.
[10] *Nuptiales tabulae* (*Dig.* xxiv. 2, 9).
[11] See also, for form of divorce, *Dig.* 24, 2, 2, 1.

SECTION 49.—RESTRICTIONS UPON AND EFFECTS OF DIVORCE

Until the legislation of Justinian,[1] to which reference has been already made,[2] there was no legal restriction upon the freedom of mutual divorce (*divortium*). For long, moreover, there was also no legal restriction upon the freedom of divorce of one spouse by the other (*repudium*), but this right came to be abused to such an extent that it was sought to check the evil by legislation imposing forfeitures or penalties upon persons who repudiated each other without sufficient reason for so doing, or whose conduct gave good ground for divorce.

The *Lex Julia et Papia Poppaea* introduced the first legislative restraints upon the freedom of divorce by repudiation. The Emperor Constantine in A.D. 331, and the Emperors Honorius and Theodosius in A.D. 421, prescribed certain grounds upon which alone one party could repudiate the other without thereby incurring severe penalties or forfeitures;[3] but their legislation, owing probably to the severity of its provisions, was subsequently superseded by legislation of a less stringent character on the part of the Emperors Theodosius and Valentinian in A.D. 449,[4] and of the Emperor Justinian; the latter Emperor repealed all former Constitutions on the subject, and fixed anew what should constitute good grounds for the divorce of one spouse by the other.[5] Amongst valid grounds which did not involve any penalty of forfeiture were the adultery of either party, an attempt by one spouse on the life of the other, an endeavour on the part of the husband to induce the wife to commit adultery, an unsubstantiated charge of adultery made by the husband against the wife, the keeping by the husband of a mistress or a concubine in the same house as his wife, and treason. If for any reasons such as these the wife or the husband, as the case might be, divorced the other, the wife, on the one hand, became entitled to the restoration of her dowry (*dos*) and also to the usufruct of the *donatio propter nuptias* if there were children of the marriage, or to the *donatio* as her absolute property if there were no children; while the husband, on the other hand, became entitled absolutely to the dowry if there were no children of the marriage, or to the usufruct of the dowry if there were children.[6]

If a husband or a wife repudiated the other for any reasons other than those recognised as valid by the legislation of Justinian, the husband

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[1] *Nov.* 117, 10-12; *Nov.* 134, 11.
[2] *Ante*, p. 169.
[3] *C. Theod.* iii. 16, 1, 2.
[4] *Code*, v. 17, 8, 2.
[5] *Nov.* 117, 8-9.
[6] See *ante*, Sections 45 and 46.

forfeited his interest in the dowry and also his matrimonial contribution in the form of the *donatio propter nuptias*, while the wife, on her part, forfeited her dowry, and was at the same time placed under a disability to contract another marriage during the next succeeding five years, as was prescribed in the legislation of the Emperors Theodosius and Valentinian.[1]

SECTION 50.—CONCUBINAGE (CONCUBINATUS)

The Roman Law recognised[2] a union, of a more or less permanent character, between a man and a woman which was of a lower degree than that of marriage, and was, moreover, regarded as, for the woman, of a somewhat degrading nature, under the name of *concubinatus* or "concubinage."

"Concubinage" was the permanent cohabitation or living together of an unmarried man and an unmarried woman; the relationship was legalised, in the reign of the Emperor Augustus, by the *Lex Julia et Papia Poppaea*, and was exempted from the penal provisions of the *Lex Julia de adulteriis*.[3]

Concubinage resembled marriage in many respects. It was a permanent union, but without the intention of creating thereby the relationship of husband and wife—in other words, it lacked what was known as *maritalis affectio*—and, like marriage, it could be dissolved at the pleasure of the parties. It was also, like marriage, of a monogamous character, and a man could not have more than one concubine at one time, nor could he either take a concubine while he still had a wife, or take as a concubine the wife of another man without rendering himself liable to a charge of adultery.[4]

Children born as the offspring of concubinage were not regarded as spurious (*spurii*), or bastards as being the offspring of promiscuous, illicit, or incestuous intercourse,[5] but were known as "natural" or illegitimate children (*naturales liberi*), as distinguished from those children who were legitimate in respect of being the issue of lawful marriage. "Natural" children, as distinguished from those that were "spurious" or bastard, and whom the law regarded as having no father,[6]

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[1] See upon divorce and legislation with regard to it—Hunter, *Roman Law*, 4th ed., 688-694; Muirhead, *Roman Law*, 2nd ed., 356; Moyle, *Institutes of Justinian*, 4th ed., 129-131; Mackenzie, *Roman Law*, 7th ed., 119-121; Sohm, *Institutes of Roman Law*, 3rd ed., 474-477; Roby, *Roman Private Law*, i. 133-135.

[2] Cf. *Dig.* xxv. 7, 3, 1.

[3] *Dig.* xxv. 7, 3, 1.

[4] *Code*, v. 26, 1; Paul, ii. 10, 1; ii. 20.

[5] *Stuprum, adulterium, incestus.*

[6] Such children were said to be *vulgo concepti* (*Dig.* i. 5, 23).

were entitled in certain circumstances, as the offspring of a recognised legal relationship, to be maintained by their father (whom the law recognised to that extent), although they had no legal rights of succession to him; and they could, moreover, be rendered legitimate, and thereby be brought under the legal authority of their father (*patria potestas*), if they so consented,[1] by the subsequent marriage of their parents.[2]

"Natural" children possessed rights of succession to their mother, however, to the same extent as her lawful children.

The essential distinction between concubinage and marriage was that a union of the former character did not create *patria potestas*, in respect of the fact that it was not lawful marriage, which alone could have that effect; and, for the same reason, there could not be constituted, in the relationship of concubinage, a valid and enforceable dowry, while mutual gifts between the parties did not possess the qualities of donations between husband and wife, but were irrevocable like any other donations *inter vivos*.

Concubinage, as part of the Roman legal system, and as a Roman legal institution, was abolished by the Emperor Leo—"the Philosopher"—in A.D. 887, on the ground that it was contrary to the Christian religion and to public decency. Thereafter the law drew no distinction between "natural" children and "spurious" children or bastards, who were both equally illegitimate. Under the Roman Law the privilege of legitimation by the subsequent marriage of the parents had been confined solely to children born in concubinage, but the later Canon Law extended the principle and the privilege to all illegitimate children, provided the parents were legally capable of contracting marriage at the time of the child's conception.[3]

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[1] *Nov.* 89, 11 pr.

[2] See legitimation *per subsequens matrimonium*, *ante*, p. 139.

[3] This is said to have been effected by two Constitutions of Pope Alexander III. See Mackenzie, *Roman Law*, 7th ed., 128. See also *ante*, pp. 139, 140.

CHAPTER VII

Guardianship—Tutory (tutela)—Curatory (cura)[1]

Section 51.—Guardianship Generally[2]

Persons might be placed under the guardianship of another person either because of youthfulness and consequent lack of understanding or judgment, or because of mental weakness, or some other special cause which presumably rendered them incapable of performing legal acts for themselves.

There were recognised by the Roman Law two general forms of guardianship known respectively as "Tutory" (*tutela*) and "Curatory" (*cura*).

All persons under the age of legal majority (*perfecta aetas*), which the Roman Law fixed at twenty-five complete years, were subject to guardianship, and also certain persons of full age but regarded by the law as of imperfect legal capacity.

"Tutory" (*tutela*) was of two kinds—(1) "Tutory of Pupils" (*tutela impuberum*) and (2) "Tutory of Women" (*tutela mulierum*).

Tutela impuberum was tutory proper, and was a right given by the law to another person to control both the person and the property of a pupil. The father, during his lifetime, was the natural tutor of his pupil child; if, however, the father was dead, and the pupil was consequently *sui juris*, he was nevertheless subject to the authority of another person as his legal tutor, in order to complete his defective legal capacity.

Tutela mulierum was a special form of tutory which had disappeared from the Roman system by the time of Justinian, so that the *Institutes* speak only of pupils as being subject to tutory.[3] The tutelage to which women were originally subject, and which, although even by the time of Gaius it was regarded as an irrational anachronism,[4] subsisted as an attenuated legal institution until the reign of Diocletian, was a right given by law to the agnates of a woman who was not in the

[1] Justinian, *Inst.* i. 13-26; *Dig.* xxvi., xxvii.
[2] *Cf.* Cuq, *Institutions Juridiques des Romains*, i. 307-312.
[3] *Cf.* Roby, *Roman Private Law*, i. 102.
[4] *Cf.* Gaius, *Inst.* i. 190.

power of either a father or a husband to prevent her from disposing of or burdening her property or from undertaking any serious obligation to their prejudice as her heirs.

The rules of female tutelage were originally very strictly enforced, but were gradually relaxed,[1] and after the reign of Diocletian entirely disappeared; so that they have no place in the Justinianian system.

"Curatory" (*cura*) was the guardianship or control exercised by a person of full age—called a *curator*—over another person who was *sui juris*, but whose legal capacity and power to administer his own affairs was qualified or limited by reason of either (*a*) minority, or (*b*) mental weakness, or (*c*) on account of some special and accidental circumstance. Curatory either might extend only to administration (*gestio*), as in the case of minors, or to both the control of the person and the administration of the property, as in the case of insane persons.

Curatory was subdivided into (*a*) Curatory of Minors (*Cura minorum*); (*b*) Curatory of a "Prodigal" (*Cura prodigi*); and (*c*) Curatory of an Insane Person (*Cura furiosi*).

Tutelage (*tutela*), according to the definition of Justinian,[2] was an authority and control over a person *sui juris*, either given or permitted by the law, in order to protect one who is too young to protect himself by reason of the lack of proper understanding (*intellectus*) and judgment (*judicium*).

The essential distinction between tutory and curatory was that the tutor was given to the person, while the curator was given to the property;[3] the principal function of the tutor was to complete the defective legal personality and capacity of his ward, while that of the curator was to administer the property of those persons who were deemed by the law incapable of managing it for themselves.

The tutor performed his essential function by means of the interposition of his authority or approval (*interpositio auctoritatis*) to acts done by his ward, thereby rendering them legally valid; he might also have the right of *gestio* or administration and disposition of his ward's property combined with his *auctoritas*, but this was not essential and was not involved, for example, in female tutelage.

The curator, on the other hand, was primarily given to the property, and the right of *gestio* or administration of the ward's property was the essence of curatory (*cura*); he did, indeed, in certain circumstances, act for and on behalf of his ward, but he did not exist, like the tutor, primarily to supplement and complete the defective capacity of his ward and to render his acts legally valid by the interposition of his approval.[4]

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[1] See *post*, Section 58, p. 184.

[2] Justinian, *Inst.* i. 13, 1; *Dig.* xxvi. 1 pr.

[3] *Cf.* Justinian, *Inst.* i. 14, 4; also *Dig.* xxvi. 2, 12, 14.

[4] *Cf.* on the distinction between *Tutela* and *Cura*, Sohm, *Inst.*, 3rd ed., 488, 489.

Guardianship was originally regarded rather as a right inherent in the agnates for the protection of their own interests than as a duty for the safeguarding of the interests of the ward; but by the time of Justinian it had come to be considered, from the point of view of public policy, as a public office (*munus publicum*) which persons nominated could not refuse to fill unless upon certain well-recognised grounds.[1] Amongst valid grounds of exemption from acting as a guardian were—(*a*) the fact of being already engaged on the service of the State,[2] or having fulfilled a public duty as by having a certain number of lawful children living, or killed in battle;[3] (*b*) having interests, or being in a position adverse to the ward—as being engaged in a lawsuit with,[4] or being a creditor or debtor of the pupil or minor as the case might be,[5] or enmity existing between them,[6] or the status of the person nominated having been challenged[7]—(*c*) being unable to fulfil the duties of the office by reason of poverty,[8] ill-health,[9] illiteracy,[10] or old age;[11] (*d*) filling or having filled similar offices;[12] (*e*) being a member of certain liberal professions, such as law, medicine, or rhetoric.[13]

SECTION 52.—TUTORY (TUTELA)[14]

Tutory, as has been already stated,[15] was of two kinds, namely, that of "Pupils" (*tutela impuberum*)—*i.e.* males under fourteen and females under twelve years of age—and that of Women (*tutela mulierum*).

SECTION 53.—TUTORY OF PUPILS

Pupils of either sex who had ceased to be under the power of a *paterfamilias*, and who were consequently *sui juris*, were placed by the Roman Law under the guardianship of a "tutor," who in the exercise of

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[1] See *Inst.* i. 25, and *Dig.* xxvii.
[2] *Inst.* i. 25, 1-3.
[3] *Inst.* i. 25 pr. This ground of exemption was first introduced by the *Lex Papia Poppaea.*
[4] *Inst.* i. 25, 4.
[5] *Nov.* 72, 1.
[6] *Inst.* i. 25, 9, 11.
[7] *Inst.* i. 25, 12.
[8] *Inst.* i. 25, 6.
[9] *Inst.* i. 25, 7.
[10] *Inst.* i. 25, 8.
[11] *Inst.* i. 25, 13.
[12] *Inst.* i. 25, 5.
[13] *Inst.* i. 25.
[14] Justinian, *Inst.* i. 13 *et seq.*
[15] *Ante*, p. 172

the functions of his office had control over the person of the pupil and the management of his property. A tutor, however, was necessary to a pupil even although he had no property, in order to supplement and complete his defective legal personality and capacity, and to enable him to perform valid legal acts; this the tutor effected by the interposition of his approval (*auctoritas*) to acts done by the pupil.[1]

Only Roman citizens who had attained majority could fill the office of tutor,[2] but a *filiusfamilias* could be appointed a *tutor*,[3] since the office was regarded as a public one, and a *filiusfamilias* was always eligible for public office.[4] Women could not, in general, act as tutors; this was one of the forms of their legal incapacity and defective status by reason of their sex; Justinian, however, after several enactments,[5] finally modified the general rule to the extent of permitting the mother or grandmother of a pupil to act as his tutor;[6] but this concession did not extend to curatory, so that as soon as a pupil attained minority or puberty the tutory of the mother or grandmother, as the case might be, *ipso facto* ceased.

Under the Justinianian law no one who was in the position of a creditor, or a debtor of a pupil could become his tutor.[7]

Section 54.—Varieties of Tutors

In the time of Justinian guardians were of three kinds: they were either appointed by will, or named by the law in the event of intestacy, or appointed by the magistrate failing either a testamentary or a legal guardian: expressed more shortly, guardians were either (*a*) testamentary, (*b*) statutory, or (*c*) magisterial.[8] According to the foregoing classification there were respectively (1) testamentary tutors; (2) tutors-at-law; and (3) tutors-dative.[9]

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[1] Justinian, *Inst.* i. 21.

[2] Justinian, *Inst.* i. 25, 13.

[3] Justinian, *Inst.* i. 14 pr.; *Dig.* xxvii. 10, 1, 7.

[4] *Dig.* i. 6, 9.

[5] *Code*, v. 25, 3; *Nov.* 89, 14; 94, 2.

[6] *Nov.* 118, 5. In such a case the mother or grandmother was preferred to all collaterals next after the testamentary tutors, provided she was willing to abstain from re-marriage and to renounce the benefit of the *S.-C. Valleianum*, which incapacitated women from binding themselves for other persons. *Cf.* Hunter, *Roman Law*, 4th ed., 718.

[7] *Nov.* 72, 1.

[8] *Cf.* Sohm, *Inst.*, 3rd ed., 492.

[9] There was also a form of tutory known as *tutela fiduciaria*. In the time of Justinian this signified the rights of tutelage vested by law in the *filiifamilias* over a pupil who had been emancipated and whose *paterfamilias* had died without nominating a tutor for him. Originally, and in the time of Gaius, fiduciary tutelage was that vested in a person who, in the course of the emancipation of a *filiusfamilias*, had,

(a) *Testamentary Tutor* (*Tutor testamentarius*)[1]

This was a tutor specially named and appointed by a father in his testament to his lawful[2] pupil children, whether already born or posthumous.[3]

The father, during his life, was the natural tutor of his pupil children, but he could by testament nominate a person or persons[4] to act as tutor to those of his children who should be under puberty and become *sui iuris* at his death.

A testamentary tutor was not required to give security for the faithful and proper discharge of his duties, because the law assumed from the fact that he had been specially selected by the father that the latter reposed special confidence in him; unless in the interval since making the appointment in the testament some change had taken place in the position of the person nominated which manifestly rendered him unsuitable for the office.

(b) *Tutor-at-Law* (*Tutor legitimus*)[5]

A tutor-at-law or "legal" tutor was a person entitled to act as tutor to a pupil child in virtue of a law or statute. The law which recognised the status of *tutor legitimus* or "legal" tutor was, primarily, the Twelve Tables, either directly by its terms, or indirectly by inference from them as interpreted by the jurists. "Legal" tutory (*tutela legitima*) was of three kinds, namely—(1) Tutory of agnates (*legitima agnatorum tutela*),[6] (2) Tutory of patrons (*legitima patronorum tutela*),[7] and (3) Tutory of parents (*legitima parentum tutela*).[8]

The Roman Law, by the Twelve Tables, gave the right of legal tutory

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after the third fictitious sale, manumitted him, and so became his patron, instead of re-mancipating the son to the father in order that the latter might acquire patronal rights. The Praetorian Edict ultimately provided against this contingency by implying in the ceremony of emancipation an agreement on the part of the fiduciary father to re-sell to the natural father so that the fiduciary father thereafter, in all cases, held the tutelage in trust for the true father. (*Cf.* Gaius, *Inst.* i. 166*a*, also i. 115, 175, 195*a*; Justinian, *Inst.* i. 19.)

[1] *Dig.* xxvi. 2.

[2] A father could nominate a tutor to an illegitimate child if, at the same time, he left him property.

[3] Justinian, *Inst.* i. 13, 4. A "posthumous" child was either (*a*) one born after the father's death, or (*b*) in a special sense, one born after the date of a testament, although in the lifetime of the testator (cf. *Inst.* iii. 13, 2).

[4] See, on "Co-tutors," *post*, Section 56, p. 182.

[5] Justinian, *Inst.* i. 15; *Dig.* xxvi. 4.

[6] Justinian, *Inst.* i. 15.

[7] Justinian, *Inst.* i. 17.

[8] Justinian, *Inst.* i. 18, 19.

to the nearest agnates of a pupil *sui juris*—who were those persons most nearly related to the pupil by "agnation," or the artificial legal tie created between persons by reason of their subjection to the *potestas* of the same person, or of their common descent from the same male ancestor—in these cases where either the *paterfamilias* had not named a tutor, or his nomination had failed (as, *e.g.*, by the predecease, or by the supervening incapacity of the nominee) because they were the heirs of the ward upon intestacy and without lawful issue, upon the expressed principle that "where the benefit of the succession is, there ought also to be the burden of the tutelage."[1]

Justinian abolished the distinction between "agnates" and "cognates," so far as tutory was concerned, and gave the right of "legal" tutelage (*tutela legitima*) to the next-of-kin, whether they happened to be agnate or cognate; and he also permitted the mother or the grandmother of a pupil to act as tutor-at-law preferably to the male agnates.[2]

The patron and his children became, indirectly, by the law of the Twelve Tables, as interpreted by the jurists, the "legal" tutor of a slave manumitted under puberty on the same principle as governed the right of the agnates of a pupil to the effect that as a patron and his children had certain rights of succession to his freedman the burden of the tutelage ought to accompany the benefit.[3]

A *paterfamilias* who emancipated a child under puberty became thereupon the "legal" tutor (*tutor legitimus*) of that child,[4] upon the same principle by which the right was given to the agnates or to the patron.

(c) *Tutor-dative* (*Tutor dativus*)[5]

This was a tutor "given" (*dativus*) or appointed by the law through the medium of a magistrate.

A "tutor-dative" was, in the ordinary case, given by the Court when there was neither a testamentary tutor appointed or capable of acting, nor any person legally entitled to the office of tutor in virtue of relationship.

A tutor-dative was, however, also appointed by the magistrate, in preference to the agnates of the pupil, when a father had named a tutor

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[1] Justinian, *Inst.* i. 17 pr.

[2] *Nov.* 118.

[3] Justinian, *Inst.* i. 17 pr.

[4] Justinian, *Inst.* i. 18; also i. 12.

[5] Justinian, *Inst.* i. 20. It must be noted that Justinian and Gaius use the term *tutor dativus* in different senses. Gaius employs it to signify a testamentary tutor (Gaius, *Inst.* i. 154), while Justinian means by it a guardian appointed by a magistrate (*Code*, i. 3, 52). *Cf.* also *Dig.* xlvi. 6, 7; Poste, *Institutes of Gaius*, 4th ed., 91.

in his testament but only to act conditionally upon the happening of some uncertain future event, in which case the tutor-dative filled the office temporarily (*pro tempore*) until the fulfilment of the condition.[1] A "tutor-dative" might, moreover, be appointed to act, in preference to the agnates of the pupil, if the person nominated by the *paterfamilias* in his testament had been specially exempted from acting,[2] or had become incapable, or had been removed from office, or taken captive.

"Tutors-dative" or "magisterial tutors" (*dativi a magistratibus*) were originally appointed in Rome under the terms of the *Lex Atilia*,[3] by the *Praetor Urbanus* and a majority of the Tribunes, but in the time of Justinian they were appointed, after inquiry, by the "City Prefect" (*Praefectus urbis*), if the pupil was of high rank or large fortune, or, in other cases, by the *defensores*,[4] who were inferior magistrates selected out of the *decuriones* of a city to hold office for two years, with a limited civil and criminal jurisdiction. In the provinces tutors-dative were appointed by the *Praeses* under the *Lex Julia et Titia*.[5]

Corresponding to the varieties of tutors,[6] "Tutory" (*tutela*) was thus of four kinds, namely—(1) *Tutela legitima;* (2) *Tutela testamentaria;* (3) *Tutela dativa;* and (4) *Tutela fiduciaria;* which were created respectively by (1) statute, (2) testament, (3) magisterial appointment, and (4) operation of law.

SECTION 55.—DUTIES OF A TUTOR[7]

The chief duties of a Roman tutor were to make provision for the proper care, and maintenance, and education of the pupil; to manage the pupil's property; and to give his sanction and approval (*auctoritas*) to acts of the pupil, when necessary, in order to complete the pupil's defective legal capacity and so render his acts legally valid. These functions of a tutor were summed up, in the Roman Law, in the expressions *auctoritatem interponere* and *negotium gerere*.

A Roman tutor had not necessarily the custody of the person of the pupil, and had not personally to undertake his maintenance and education; in the absence of an appointment by the father for the purpose, the pupil's mother, so long as she remained unmarried, had his custody;

[1] Justinian, *Inst.* i. 20, 1.

[2] For grounds of exemption from the office of guardian, see *ante*, p. 175.

[3] Justinian, *Inst.* i. 20 pr. The date of this statute is uncertain, but it is generally fixed about B.C. 197.

[4] Justinian, *Inst.* i. 20, 3, 5. Cf. *Dig.* xxvi. 5, 1; *Code*, i. 4, 30.

[5] *Circa* 31 B.C. On the dates of the "Atilian Law" and the *Lex Julia et Titia*, see Sandars, *Institutes of Justinian*, 65.

[6] See *ante*, p. 176.

[7] Justinian, *Inst.* i. 21.

the Praetor determined, if necessary, what was the amount requisite, in the circumstances, for the pupil's maintenance, and it was the tutor's duty to provide that sum out of the pupil's property. The Court also usually determined where the pupil should be educated.[1]

Up to the age of seven a pupil was styled an "infant" (*infans*), and, in respect of not possessing either understanding (*intellectus*) or judgment (*judicium*), was under an absolute legal incapacity; the tutor consequently acted for an *infans* personally, on his behalf, and had the sole administration of the infant pupil's property.[2] A pupil ward above the age of seven possessed a limited legal capacity which enabled him to do legal acts wholly beneficial to himself without the sanction of his tutor—on the principle that pupils could make their position better but not worse without tutorial authorisation[3]—but which was yet so defective that it necessitated the presence and consent of the tutor at the time of the transaction,[4] in the case of any legal acts done by the pupil involving possible liability or loss, in order that the act should bind the pupil or his property.[5] In such cases the pupil himself went through the forms requisite for the validity of the transaction, but the use of the forms required to be supplemented by the presence of the tutor in order to complete their validity by means of his sanction (*auctoritas*). The pupil, in respect of possessing understanding (*intellectus*) could understand the meaning of the form which he used, but his lack of judgment (*judicium*), due to youthful inexperience, rendered him unable to determine whether it was to his advantage to employ the forms; the tutor's sanction supplied the pupil's lack of judgment, and rendered the transaction legally valid and binding.[6]

In all cases of reciprocal obligation, as in contracts of buying, selling, letting, hiring, mandate, or deposit, the pupil was only bound if the tutor had authorised the pupil to enter into the transaction; if the tutor had not consented to the transaction the pupil was not bound but the person who contracted with him was bound.[7] But a pupil could

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[1] See *Dig.* xxvii. 2; *Code*, v. 49. *Cf.* these functions of a Roman tutor with those of an English guardian who has imposed upon him personally the duties of custody, maintenance, and education.

[2] Justinian, *Inst.* iii. 19, 10; Gaius, *Inst.* iii. 109.

[3] Justinian, *Inst.* i. 21 pr.; ii. 8, 2. See Commentary on these sections in Sandars' *Institutes of Justinian.*

[4] Justinian, *Inst.* i. 21, 2.

[5] *Dig.* xxvi. 8, 9. *Cf.* Moyle, *Inst.*, 4th ed., 150; Poste, *Institutes of Gaius*, 4th ed., 90; Sohm, *Inst.*, 3rd ed., p. 489.

[6] The tutor's intervention and authorisation required to be (*a*) at the time of the transaction (*in ipso negotio*), (*b*) in person (*praesens*), and (*c*) voluntary. An authorisation given subsequently, or by letter, was of no effect (*Inst* i. 21, 2).

[7] Justinian, *Inst.* i. 21 pr.

not repudiate a contract and at the same time retain the benefit of it; he could not, for example, demand back property sold by him and at the same time retain the price paid to him, or keep what he had bought and refuse payment for it.[1] A pupil could not be compelled to refund or restore anything that had been consumed, and he could always repudiate an executory contract made without tutorial sanction to his prejudice, whereas he could enforce such a contract through the intervention of his tutor, if it was to his advantage.

There were three sets of circumstances in which the act of a pupil ward was wholly invalid without tutorial authorisation, even although the act might be to the pupil's advantage, because it might subsequently involve obligations which, of course, a pupil, on the general principle, could not undertake. Thus a pupil could not, without the sanction of his tutor—(*a*) enter upon an inheritance, or (*b*) demand possession of goods, or (*c*) take an inheritance given by a trust (*fideicommissum*).[2]

There were, on the other hand, three cases in which a pupil could competently be sued upon acts done without the sanction of the tutor; he was liable (*a*) for his own wrongdoing or delict, (*b*) for an obligation of mere restitution, and (*c*) if and in so far as he had been enriched (*lucratus*) by a transaction.[3]

The tutor and the pupil were in a quasi-contractual relation towards each other. A tutor was bound to devote the same care (*diligentia*) to the management of his pupil's affairs as he gave to his own,[4] and he was liable for any loss occasioned to the pupil, or to his property, by reason of wilful bad management (*dolus*), or of his carelessness (*culpa*),[5] and, in respect of this liability, his estate was subject to a tacit hypothec.

The tutor was entitled, in the administration of the pupil's property, to collect debts, draw rents and interest, and, if he considered it right and necessary, to sell the movable property or any part of it; but

[1] *Dig.* xliv. 1, 4.

[2] Justinian, *Inst.* i. 21, 1. The "inheritance" (*haereditas*) here referred to was the legal succession to a deceased person, while the "possession" was the special interest in the estate of a deceased person recognised by the Praetor under the name of *bonorum possessio* (see *Inst.* iii. 9).

[3] *Dig.* xxvi. 8, 5, 1; xliv. 4, 4, 4.

[4] *Dig.* xxvii. 3, 1 pr.; but cf. *Dig.* xxvi. 7, 33, which seems to fix as the standard of diligence the care of the abstract prudent man (*bonus paterfamilias*). Towards the pupil himself the tutor required to act as a *bonus paterfamilias* (*Dig.* xxvi. 7, 10), but there can be little doubt that as regards administration the standard of diligence required was only average or ordinary diligence, for the office was for the benefit of the ward and not that of the tutor, and further, as the latter could not, except in exceptional circumstances, refuse to act, he had imposed upon him thereby, by the law itself, without any consent on his part, certain responsibilities. In such circumstances it would have seemed inequitable to require the highest degree of diligence (*exacta diligentia*). *Cf.* principle of liability for care under contracts, *post*, Part IV., "Obligations."

[5] *Code*, v. 51, 7.

he was only entitled to alienate immovable property under judicial sanction upon proved necessity.[1]

A tutor was not entitled, in the ordinary case, to buy or to acquire for himself, or for his *paterfamilias*, or *filiusfamilias*,[2] any part of his ward's estate, or to do any act connected with it for his own personal benefit—as, for example, to give his sanction to an act of the pupil that would benefit himself—because to do so would be calculated to bring his own private and personal interests into conflict with those of the pupil, which it was his special duty to protect, and thus violate the rule of the civil law that a tutor could not be *auctor in rem suam*.[3] Notwithstanding this rule, however, a tutor might, exceptionally, buy property belonging to his ward either when the property was sold by a creditor,[4] or when the property sold was only a portion of the whole, separately administered by a co-tutor, and sold with his consent.[5]

SECTION 56.—CO-TUTORS (CONTUTORES)

When there was more than one tutor appointed, the consent of one sufficed under the Justinianian law, although not originally, to bind the pupil so long as it did not involve the termination of the tutelage, as, for example, by the arrogation of the pupil.[6]

Co-tutors might either administer the pupil's property jointly or divide the property into separate portions and entrust the administration of each separate part entirely to one tutor.

The liability of co-tutors varied according as their administration was joint over the whole, or as each, either by private agreement or with judicial sanction, administered a certain portion of the estate.

When portions of the pupil's estate were administered separately by co-tutors merely by private agreement amongst themselves (*inter se*), and unfortified by judicial sanction, their liability continued joint, and each tutor remained liable for all loss sustained through the misconduct or the fault of any of his co-tutors; in other words, the liability of co-tutors in such a case was *singuli in solidum*.[7]

When, on the other hand, the administration of the estate was divided, either by the testator in the testament nominating the co-tutors or with judicial sanction, each tutor was responsible only

[1] *Dig.* xxvii. 9.
[2] *Dig.* xxvi. 8, 7, 2.
[3] *Dig.* xxvi. 8, 1 pr.
[4] *Dig.* xxvi. 8, 5, 5.
[5] *Dig.* xxvi. 8, 6.
[6] *Code*, v. 59, 5.
[7] *Code*, v. 52, 2.

for that portion entrusted to him,[1] unless he had good reason to doubt the honesty of any or all of his co-tutors and did not take steps accordingly, in which case he was liable for all resulting loss.[2]

When several tutors were appointed and the administration was not divided, it was usual in practice to entrust the administration to certain of the tutors, the remaining ones being known as "honorary" (*tutores honorarii*). The liability of all the tutors, nevertheless, in such a case continued unaffected, and the "honorary" tutors were bound to keep themselves acquainted with the doings and accounts of the acting tutors, who on their part were bound to exhibit their accounts to them, under pain of removal from office.[3]

It was customary for the acting tutors to give security to their "honorary" co-tutors.

SECTION 57.—TERMINATION OF TUTORY

Tutory generally ended by the pupil attaining puberty, but it was also ended by the death of either the pupil or the tutor; by the pupil ceasing to be *sui juris*, as through arrogation; by the tutor being either legally excused or legally disqualified from acting, or being removed from office by the Court for misconduct; also by the captivity of either the pupil or the tutor, and by the fulfilment of a condition or by the expiry of a period qualifying the appointment.[4]

The *capitis deminutio* of a pupil, in any degree, terminated the tutelage; but the *capitis deminutio minima* of a tutor ended only "legal" tutory (*tutela legitima*), and both testamentary and "dative" tutory were ended only by *capitis deminutio maxima* and *media*.

Tutory was also terminated by a pupil being deported (*deportatus*), and by a pupil freedman (*libertinus*) being reduced once more to slavery for "ingratitude," but these latter modes of termination only operated in the case of pupils nearing puberty (*pubertati proximi*).[5]

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[1] *Code*, v. 38, 2.

[2] *Dig.* xxvi. 7, 14; *Code*, v. 52, 2.

[3] *Dig.* xxvi. 7, 3, 2.

[4] This applied equally to testamentary and to "dative" tutors. "Tutory dative" (*Tutela dativa*) ended if either the magisterial appointment had been made pending the fulfilment of a condition, or until the arrival of a certain time, by the fulfilment of the condition, or by the lapse of the time respectively.

[5] See on tutory of pupils generally, Hunter, *Roman Law*, 4th ed., 696-727; Sohm, *Institutes of Roman Law*, 3rd ed., 488 *et seq.*; Poste, *Institutes of Gaius*, 4th ed., 87 *et seq.*; Moyle, *Institutes of Justinian*, 4th ed., 147 *et seq.*; Mackenzie, *Roman Law*, 7th ed., 150-153; Sandars, *Institutes of Justinian*, 8th ed., 54 *et seq.*; Leage, *Roman Private Law*, 98-105; Girard, *Manuel de Droit Romain*, 197-214; May, *Éléments de Droit Romain*, 126-140; Didier-Pailhé, *Droit Romain*, 4th ed., i. 84-106; Cuq, *Institutions Juridiques des Romains*, i. 322-330, 565, 566.

SECTION 58.—TUTORY OF WOMEN (TUTELA MULIERUM)[1]

The early Roman Law placed all women except vestal virgins[2] under a sort of perpetual tutelage, on account of their presumed "lightness of disposition"[3] and liability to be swayed in their judgment. When a woman ceased to be under the power of her father or her husband, the law placed her under the tutelage or care of her agnates, with a view to safeguard the woman's property for them as her heirs. This form of tutory was known as *tutela mulierum*, as distinguished from *tutela impuberum*.

The agnatic tutors had not the right of *gestio* or actual administration of the woman's property, but merely the right of interposing their authority (*auctoritatis interpositio*) in order to prevent the woman from disposing of her property or from undertaking any serious mutual obligations without their consent. The object of the interposition of the approval of the agnates was originally in order to protect their own rights of succession, which might be prejudiced by such alienations or by such obligations.[4]

The rules of female tutelage were originally very rigidly enforced, but in course of time they were gradually relaxed; in the time of Gaius the sanction of the guardian had become a mere form, which he could, in general, be compelled to give,[5] although the institution of female tutelage did not entirely disappear until after the time of the Emperor Diocletian.[6]

The Emperor Claudius abolished the legal tutorship of agnates over women of full age;[7] the Emperor Hadrian by a *Senatus-consultum* enabled a woman to make a will without the necessity of resorting to the form of a fictitious co-emption, and compelled the woman's guardian, if not either a parent or a patron, to give his consent; the *Lex Julia et Papia Poppaea* exempted from tutelage women who had a certain number of children, in virtue of the *jus liberorum*, freeborn women (*ingenuae*) who had three lawful children, and freedwomen (*libertinae*) who had four lawful children being entitled to the privilege.

"In the time of the classical jurists every woman who was *sui juris* and who was not a vestal virgin, or exempted under the *Lex Papia*, must have a guardian; but his *auctoritas* was not requisite for the validity of

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[1] See *ante*, p. 173; also Gaius, *Inst.* i. 189-193; Poste's *Gaius*, 108.
[2] Gaius, *Inst.* i. 145.
[3] Gaius, *Inst.* i. 190.
[4] *Cf.* Poste, *Institutes of Gaius*, 3rd ed., 110.
[5] Gaius, *Inst.* i. 190, 192.
[6] *Cf.* Mackenzie, *Roman Law*, 7th ed., 150.
[7] Gaius, *Inst.* i. 157.

all dispositions, and where it was he could not refuse it, unless he were a *patronus* or a *parens manumissor*."[1]

By the time of the Emperor Diocletian (284 A.D.) the rules of female tutelage, if they had not entirely disappeared, had become a mere form,[2] and before the time of Justinian, had, both in form and substance, disappeared from the Roman legal system.[3]

The tutory of women is chiefly distinguished from that of pupils in that it was perpetual, and did not terminate on the attainment of puberty. A woman above puberty could alienate *res nec mancipi*, and take part in any transaction not governed by the strict *jus civile* without the intervention of her tutor, while a pupil required the sanction of the tutor in order to validate all legal transactions entered into by him that might involve liability. The functions of the tutor of a woman above puberty were confined, under the later law, to interposing his authority, but the right of administration (*gestio*) was in the hands of the woman, while as regards a pupil the functions of the tutor were those both of giving approval (*interpositio auctoritatis*) and of management (*gestio*). Further, a woman could generally, in the time of Gaius, compel the tutor to give his sanction as a merely formal executive act, and a woman was entitled, in certain cases, to choose her tutor.[4] Moreover, the guardianship of a female ward could usually be transferred by *in jure cessio*, which was not permitted in the case of a male pupil ward.[5]

SECTION 59.—CURATORY (CURA)[6]

Curatory, as a general term, was the guardianship or care (*cura*) exercised by a person of full age, called a curator, over another person who was *sui juris*, or legally independent of the authority of a *pater-familias*, but whose legal capacity to manage his own affairs was qualified

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[1] Moyle, *Institutes of Justinian*, 4th ed., 149; Gaius, *Inst.* i. 192. When the guardianship was the *legitima tutela* of a patron, or of a *parens manumissor*, this right to withhold consent was based on the fact that they were her heirs on intestacy. Even then such guardians could only withhold consent when the woman sought to alienate *res mancipi*, or to incur an obligation, or to make a will, and in exceptional cases and for weighty reasons such guardians might be compelled to consent (Gaius, i. 192).

[2] Girard, *Manuel de Droit Romain*, 216.

[3] See Poste's *Institutes of Gaius*, 4th ed., 110, 111.

[4] See Gaius, *Inst.* i. 114, 115, 150-154.

[5] Gaius, *Inst.* i. 168. A person to whom a female ward's guardianship was thus transferred was called *tutor cessicius* or "cessionary tutor," and the form of guardianship was known as *tutela cessicia*, which, however, no longer existed in the time of Justinian. See on female tutelage generally, Poste's *Gaius*, 4th ed., 110-112; Moyle, *Institutes of Justinian*, 4th ed., 148, 149; Mackenzie, *Roman Law*, 7th ed., 149, 150; Roby, *Roman Private Law*, i. 101, 102; Leage, *Roman Private Law*, 105-109; Girard, *Manuel de Droit Romain*, 214-216; Didier-Pailhé, *Droit Romain*, 4th ed., 107-110; May, *Éléments de Droit Romain*, 140-142; Cuq, *Institutions Juridiques des Romains*, i. 316-322, 561-565.

[6] Justinian, *Inst.* i. 23.

or limited by reason of either minority, or mental weakness, or on account of some special physical defect.

The persons who, under the law of Justinian, required curators were minors (*adolescentes*),[1] insane persons (*furiosi*), and interdicted prodigals (*prodigi*);[2] also the dumb and the deaf, and those persons who by reason of constant and incurable illness were considered to be unable to manage their own affairs.[3]

> The blind, however, were not subject to curatory, the reason adduced by the jurist Paul being that they being able to speak could appoint procurators.[4] The subjection of persons to curatory on account of special physical defects was a late extension of the law which from the time of the Twelve Tables had recognised only guardianship of madmen (*furiosi*) and of prodigals (*prodigi*).

Curators might, moreover, be appointed in special circumstances, for special purposes—such as to conduct a law suit,[5] or to take the place of, or to act along with a tutor who was unable to act by reason of either incapacity, or unfitness, or of being legally excused from filling the office.[6] The reason given for the appointment of a curator to a pupil in the latter case was that having already a tutor he could not have another given to him.

The power of the curator usually only extended over and was concerned with the property and the proprietary rights of the ward, and not over his person; but when the person under curatory was of unsound mind the curator's powers extended over both the property and the person of the ward. The essence of curatory (*cura*), however, was the right of administration of property (*gestio*).

Section 60.—Who could be Curators

In general all persons who were legally qualified to act as tutors could also act as curators; but the special right given to mothers and grandmothers to act as tutors did not extend to the office of curator, so that in such a case the mere attainment by the pupil of puberty or minority *ipso facto* ended their authority. No one could act as either tutor or curator who had interests in opposition to those of the ward; so debtors and creditors of minors were precluded from filling the

[1] *Inst.* i. 23 pr.
[2] *Inst.* i. 23, 3.
[3] *Inst.* i. 23, 4; cf. *Dig.* xxvii. 10.
[4] Paul, *Sent.* iv. 12, 9.
[5] *Inst.* i. 23, 2.
[6] *Inst.* i. 23, 5.

office.[1] A husband could not, under the law of Justinian, be curator to his wife even although he intermeddled with her affairs,[2] contrary to the usual rule that a tutor or curator who had intromitted with the affairs of the ward was regarded as having renounced his right to excuse himself from acting.

SECTION 61.—CURATORY OF MINORS[3]

The curator of a minor was "a person appointed to aid a minor *pubes* who is *sui juris* in the administration of his property till he reaches majority."[4]

A tutor, in the ordinary case, became *ipso facto* the pupil's curator upon the attainment of puberty or minority by the pupil, or, in other words, by the fact of the *impubes* becoming *pubes;* but the tutor was entitled to decline to continue to act in the character of curator.[5]

A father might, in his testament, nominate a curator for his minor children, just as he might name a tutor, but the appointment did not become effective unless and until the Court had judicially confirmed it. It was, at Rome, the Praetor or the City Prefect (*praefectus urbis*), and in the provinces the *praeses* or the municipal magistrate, who appointed curators. A minor did not necessarily, unless in certain special circumstances,[6] require to have a curator appointed, so that the father's appointment would only be given effect to if the Court considered it necessary. Moreover, the Court would not necessarily confirm the father's nomination, although it would be preferably inclined to do so; failing nomination by the father the Court would, if necessary, appoint a curator from amongst the nearest relations of the minor, if suitable for the office.

A minor did not necessarily require to have a curator,[7] but if appointed he continued in office until the minor attained majority,

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[1] *Code*, v. 34, 8; *Nov.* 94 pr.; *Nov.* 72, 1; see also Section 51, p. 175.

[2] *Inst.* i. 25, 19.

[3] Justinian *Inst.* i. 23; *Dig.* xxvi. 5, 10; *Code*, v. 31, 75; see also on Curatory of Minors, Poste, *Institutes of Gaius*, 4th ed., 114 *et seq.*; Muirhead, *Roman Law*, 2nd ed., 326; Mackenzie, *Roman Law*, 7th ed., 153-156; Hunter, *Roman Law*, 4th ed., 608; Sohm, *Institutes of Roman Law*, 3rd ed., 217, 218, 489, 490; Roby, *Roman Private Law*, i. 123, 126; Moyle, *Institutes of Justinian*, 4th ed., 168, 169; Girard, *Manuel de Droit Romain*, 2nd ed., 222-227; Cuq, *Institutions Juridiques des Romains*, i. 566-571.

[4] Mackenzie, *Roman Law*, 7th ed., 153; *cf.* Gaius, *Inst.*, i. 197; Justinian, *Inst.* i. 23 pr.

[5] Justinian, *Inst.* i. 25, 18.

[6] See *post*, p. 189.

[7] *Inst.* i. 23, 2.

or had obtained a "dispensation of age" (*venia aetatis*),[1] unless he had been appointed only for a particular and special purpose.

A minor who was *sui juris* and had no curator could enter into any legal transactions and effectually bind himself, even as surety for a third party, subject, however, to a right of rescission; if, however, a minor had a curator he could only bind himself with the consent of his curator in all transactions of importance, such as the alienation or burdening of his property, or the incurring of serious obligations; but his consent was not essential to the validity of minor civil acts of relative unimportance. The consent of the curator to the transaction usually rendered it unchallengeable.[2]

A minor without a curator was entitled to be "restored" against his act, or, in other words, to be put back as nearly as possible into the position in which he was before, just as if the transaction had never taken place, provided he could prove that the transaction had caused him serious material injury or "lesion" (*laesio*), and that he himself had not been fraudulent in the course of the transaction. It was not necessary for the minor either to allege or to prove fraud on the part of the other contracting party; it was sufficient if he could show that youthful inexperience had led him to enter into an unwise transaction.[3] This right to claim restoration against injurious transactions, competent to a minor, was known as *restitutio in integrum*, and was a remedy introduced by the Praetor; the law allowed to a minor a period of four years after attainment of majority, known as the *quadriennium utile*, within which to exercise this right and to claim restitution.[4] If a minor had received from the other party to the transaction an equivalent for the prejudicial act against which he sought restitution, he was bound to make restoration, so far as he was enriched (*lucratus*), to the other party.[5]

Moreover, a minor might effectually bar himself from claiming restitution by homologating the prejudicial transaction either directly or indirectly, as by paying interest, after attaining majority.[6]

Curatory of the insane (*furiosi*) and of prodigals (*prodigi*) existed even before the time of, and was recognised by, the Twelve Tables, a person suffering from acute insanity (*furor*) being placed under the

[1] See *post*, Section 62, p. 190. *Cf.* Girard, p. 227.

[2] See Hunter, *Roman Law*, 4th ed., 608, and references *ibi.*

[3] *Code*, ii. 22, 5 pr. 1; *Dig.* iv. 4, 44.

[4] *Restitutio in integrum* might even be competent to a minor who had a curator if he could show serious prejudice (Moyle, *Inst.*, 4th ed., 169). In such a case, however, the *onus* of proof of lesion would be intensified.

[5] *Cf.* French Civil Code, Art. 1312.

[6] See on *restitutio in integrum*, *Dig.* iv. 4; *Code*, ii. 22; also *ante*, Section 14 (*b*), pp. 86-88.

"legal" curatory (*cura legitima*) of his nearest agnates, or of his *gentiles* if there were no agnates,[1] while a spendthrift (*prodigus*) was, on the application of his relatives, prohibited or interdicted from managing his affairs, the administration of which was given to a curator, who was usually one of the interdicted person's relatives.[2] Prior to the *Lex Plaetoria*, however, the date of which is uncertain, but which is supposed to have been enacted some time between B.C. 254 and B.C. 186, a person who had attained puberty, was mentally sound, and *sui juris*, but under majority, received no protection from the law, which proceeded upon the theory of an absolute legal capacity as soon as puberty had been attained. The first form of guardianship of minors (*cura minorum*) is found in the *Lex Plaetoria*, which subjected to criminal penalties and "infamy" any persons fraudulently overreaching a minor and taking advantage of his inexperience for their own benefit. Subsequently the Praetors came to grant the remedy of rescission of a transaction by a minor, under the name of *restitutio in integrum*, in those cases where the minor could show that he had suffered prejudice through his youthful inexperience, without the necessity of proving fraud on the part of the other party to the transaction.[3]

The liability to prosecution under the *Lex Plaetoria*, or risk of rescission of the transaction by the Praetor, rendered it increasingly difficult to induce persons to deal with minors, and it became usual, in practice, for minors to apply to the magistrate to appoint a curator to assist them in transactions of particular importance, and to obviate, by his assent, the risk of subsequent challenge. But guardianship of minors, as a permanent institution, may be said to have only originated with the Emperor Marcus Aurelius (A.D. 161-180), who first made curatory a general permanent office, granted, as a matter of course, on the application of the minor, without inquiry, and continuing thereafter until he attained majority.[4]

Although it became customary for all minors who were *sui juris* to have curators, the strict theory of the law according an absolute legal capacity to males above puberty subsisted down even to the time of Justinian, and a minor could not be compelled to have a curator against his will except in certain special circumstances, and for a particular purpose (*ad certum causam*), namely—(1) when a minor was a party to a lawsuit,[5] for no judgment could be given against a minor unless the litigation was sanctioned by a curator; (2) when a minor had a payment to receive;[6] (3) when the tutor was rendering his accounts;[7] and

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[1] *Cf.* Cic., *de Invent.* ii. 50.

[2] *Dig.* xxvii. 10, 1 pr.

[3] See upon the remedy of *restitutio in integrum*, Poste's *Gaius*, 4th ed., 116 *et seq.*; also, see *ante*, Section 14 (*b*), pp. 86-88.

[4] *Cf.* Muirhead, *Roman Law*, 2nd ed., 326.

[5] Justinian, *Inst.* i. 23, 2; *Dig.* xlii. 1, 45, 2.

[6] *Dig.* iv. 4, 7, 2.

[7] *Code*, v. 31, 7.

(4) when the minor desired to give himself in arrogation.[1] In these respective circumstances the other party to the lawsuit, the debtor, or the tutor, as the case might be, was entitled to demand the appointment of a curator in order to obviate the risk of a renewal of the action, or of any questions being subsequently raised with regard to the validity or accuracy of the payment, or of the accounts.

The curator of a minor was responsible for his actings, and for the proper discharge of the duties of his office, just as was the tutor of a pupil. He was bound to keep and to render an account of his administration, and he was liable to be sued for any failure in duty whereby loss was occasioned to his ward.

"The powers, duties, and responsibilities" of the curators of minors "became a matter for careful and elaborate definition and regulation by the jurists, whose exposition of the law of guardianship, whether by tutors or curators, has found wide acceptance in modern systems of jurisprudence."[2]

SECTION 62.—TERMINATION OF CURATORY OF MINORS

The curatory of minors usually ended by the minor attaining majority — twenty-five complete years; but, from the time of the Emperors Severus[3] and Caracalla,[4] it might also, occasionally, terminate by the minor obtaining, before the age of legal majority, upon proof of special capacity for the management of his own affairs, a "dispensation of age" (*venia aetatis*) in the form of a rescript from the Emperor, which dispensed with the remaining years of minority, and entitled the minor to manage his affairs and to enter into transactions without the consent of a curator as if he were of full age. As a result he lost the right to claim *restitutio in integrum* with regard to transactions incurred subsequent to the dispensation; but notwithstanding the dispensation of age, and with it the termination of the minor's general civil incapacity, he was still prohibited from making donations, or alienations, and dispositions of his property of a considerable extent.[5]

A "dispensation of age" was only granted to males who had attained twenty, and to females who were over eighteen years of age.[6]

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[1] *Code*, i. 7, 8.
[2] Muirhead, *Roman Law*, 2nd ed., 326.
[3] A.D. 193-211.
[4] A.D. 211-217.
[5] *Cf.* Girard, *Manuel de Droit Romain*, 227; Mackenzie, *Roman Law*, 54.
[6] *Code*, ii. 45.

SECTION 63.—CURATORY OF THE INSANE AND OF PRODIGALS [1]

Insane persons (*furiosi*), whether minors or majors, and prodigals or spendthrifts (*prodigi*), were by the Twelve Tables put under the care or guardianship (*cura*) of their nearest agnates, and if there were no agnates, or if, from any cause, such agnates as there were could not act, the magistrate appointed a guardian; but until the *Lex Plaetoria* the law afforded no protection to persons of sound mind who were over puberty but under majority, the theory of the strict civil law assuming an absolute legal capacity on the attainment of puberty.[2]

The curatory of the insane extended over both the person and the property of the ward, whose legal incapacity was absolute; and the curator himself entered into all transactions in his own name on behalf of his ward because the latter was, by reason of his diseased mental condition and consequent mental weakness, incapable of understanding or of giving any true consent. The incapacity of the insane, however, only subsisted so long as the insanity lasted, so that the act of a person who was *furiosus*, if done during a "lucid interval" or period of mental clearness or sanity, was valid, even though he subsequently became once more insane.

> The principle upon which the appointment of a curator to an insane person originally proceeded was in order that the interests of the heirs of the insane person might be protected; but under the later law the object was to protect the interests of the insane person himself; which view is more in accord with modern principles.

The limits of legal incapacity, involving the appointment of a curator, were extended by the Praetor to cases of incapacity other than those of the insane (*furiosi*); and in the time of Justinian, generally speaking, all who were physically or mentally unable to look after their own affairs—such as persons of unsound mind,[3] the deaf, the dumb, the incurably diseased—were protected by the law requiring the appointment of a curator;[4] and the requirement of the law was further extended, in special circumstances, to incapacity due merely to old age, illness generally, or physical weakness from any cause.

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[1] See also *ante*, Section 59, p. 185, curatory generally, and curatory of minors, Section 61; also *cf.* Cuq, *Institutions Jurisdiques des Romains*, i. 312-316.

[2] See *ante*, p. 189.

[3] This included, in the time of Justinian, both actually insane persons (*furiosi*) and imbeciles, or persons suffering from chronic insanity (*capti mente*); in other words, all persons suffering from insanity, whether in the acute form known as *furor* or in the chronic form called *dementia*. The term *furiosus* was strictly construed in the Twelve Tables, so that their protection did not extend to imbeciles.

[4] Justinian, *Inst.* i. 23, 4.

A prodigal or spendthrift (*prodigus*) who by his extravagance was wasting his property, might, according to the customary law prevailing even before, and given effect to in the Twelve Tables, be interdicted and prohibited from managing his property, which was put under the charge of a curator who was, under the earlier and usually, although not necessarily, under the later law, one of the nearest agnates of the prodigal.[1] After interdiction the curator administered the property, and the prodigal (*prodigus*) could not validly alienate or burden any part of his property, or incur any liability, without the consent of the curator.[2] The provision made by the Twelve Tables for the interdiction of a prodigal was, however, limited in its application, having reference only to the cases of those persons who were wasting property to which they had succeeded on the intestacy of an ascendant. The Praetor extended the interdiction of prodigals to all cases of reckless dissipation of property without regard to the mode of acquisition, and under the Praetorian law a curator was appointed or "given" (*dativus*) by the magistrate on the application of the relations of the prodigal. The curator so given might be, but was not necessarily, one of the agnates of the *prodigus*.

There was this distinction between an interdicted prodigal and a person *furiosus*—that the former was absolutely incapable of doing any juristic act involving liability, although, like a pupil, he could make his position better; the latter, on the other hand, was not interdicted from doing legal acts, and all such acts done by him in periods of sanity, whether involving liability or not, were valid.

Curatory of the insane terminated by the afflicted person becoming mentally sound, and curatory of prodigals ended with the conversion of the prodigal; but judicial sanction was probably essential to establish the alteration of status and capacity.[3]

SECTION 64.—CURATOR AD LITEM

In the ordinary case, when a curator to a minor was appointed he continued to fill the office until the minor attained majority, unless the curatory, for any reason, had ended sooner; but curators might also, in certain circumstances, be appointed for a particular purpose, within the limits of which their functions were confined, and on the accomplishment of which their functions terminated.[4] Thus, a minor might be engaged

[1] *Dig.* xxvii. 10, 1 pr.; *Inst.* i. 23, 3.

[2] For the form of interdiction of a "prodigal," see Paul, *Sent.* iv. 4, 7.

[3] *Cf.* French Civil Code, Art. 512.

[4] Justinian, *Inst.* i. 23, 2; *Dig.* iv. 4, 7, 2. See also *ante*, Section 61, p. 189, for special circumstances in which a minor could be compelled to have a curator.

in litigation with his guardians, or, being without a curator, he might be involved in litigation with strangers; in such cases the Court would appoint a curator *ad litem* to assist the minor in the prosecution or in the defence of the action (*lis*), as the case might be. The duties of such a curator were wholly confined to the litigation and to matters connected with it; on the termination of the litigation his functions would also end, and he would become thereby *functus*.

SECTION 65.—HOW TUTORS AND CURATORS WERE COMPELLED TO PERFORM THEIR FUNCTIONS PROPERLY

Tutors and curators, other than those named by a father in his testament, required to give security or guarantee for the proper discharge of their duties. They were usually only appointed by a superior magistrate after inquiry as to their fitness for the office; they had to make an inventory of the ward's property before entering upon their duties, and they required to take an oath when they entered upon the office that they would faithfully discharge their duties and administer the property in their care as a *bonus paterfamilias*;[1] their own property was, moreover, subject to a tacit or implied hypothec in security of their administration of the ward's estate; they were bound to render accounts showing their actings and intromissions in connection with the property, and they could be compelled, if need were, to account by means of either the *actio tutelae* or the *actio curatelae* respectively; a tutor or curator guilty of fraud or of any form of misconduct in the exercise of his duties could be removed from office by means of the *actio* (or *accusatio*) *suspecti*, the effect of which procedure, if successful, was to brand him with "infamy" (*infamia*).[2]

The exposition by the Roman jurists of the law of guardianship, whether by tutors or curators, has found wide acceptance in modern systems of jurisprudence.[3]

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[1] *Nov.* 78, 7.

[2] Justinian, *Inst.* i. 26.

[3] Muirhead, *Roman Law*, 2nd ed., p. 326.

PART III

THE LAW RELATING TO THINGS OR PROPERTY

Chapter I.—Classifications of Things

„ II.—Ownership and Possession

„ III.—Acquisition of Things

„ IV.—Tradition (Traditio) or Delivery of Property

„ V.—Prescription (Praescriptio)

„ VI.—Donation (Donatio)

„ VII.—Termination of Ownership

„ VIII.—"Real" Rights less than Ownership; Rights in the Property of Another Person

„ IX.—Rights other than Servitudes over the Property of Another Person which fell short of Ownership

PART III

THE LAW RELATING TO THINGS OR PROPERTY[1]

CHAPTER I

Section 66.—Things Generally

A "thing" was signified in the Roman Law by the term *res*, and this term was applied by the Romans to whatever might form part of a person's property (*patrimonium*).[2]

As employed in the Roman Law, the term *res* included not only objects that are material and tangible, but also those legal abstractions that are immaterial and intangible, such as a mere right to property. In other words, the word *res* or "thing" was applied in the Roman Law to everything that could be the object of a legal right, or over which legal rights could be exercised by persons, and consequently included both actual material objects and such immaterial property as rights of inheritance, rights of servitude, and rights and duties created in virtue of legal obligations.[3] "Persons" were treated by Justinian as the *subjects* of rights which they exercise over things, and "things," in the wide sense in which the term was employed in the Roman Law, were considered as the *objects* over which rights are exercised by persons.[4]

Section 67.—Divisions of Things

Notwithstanding a special but illogical and unscientific classification of private law[5] that will be more particularly mentioned presently,[6] the Roman Law, although not expressly, yet in effect, classified things upon three different principles, namely: (1) according to the physical nature of the thing; (2) according to the mode by which the property might be transferred; and (3) according as the thing could or could not be the subject of private ownership.

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[1] *Jus quod ad res pertinet. Jus rerum.*
[2] *Cf.* Buckland, *Roman Private Law*, 58.
[3] *Cf.* Sohm, *Institutes of Roman Law*, 3rd ed., 302.
[4] *Cf.* Girard, *Droit Romain*, 5th ed., 239.
[5] Justinian, *Institutes*, i. 2, 12.
[6] *Post*, p. 198.

Considered according to their physical nature, things were divided into those that were (*a*) corporeal (*res corporeales*) and incorporeal (*res incorporeales*); (*b*) movable (*res mobiles*) and immovable (*res immobiles*); (*c*) consumable (*res quae usu consumuntur*) and inconsumable (*res quae usu non consumuntur*); (*d*) fungibles (*res fungibiles*) and non-fungibles (*res non fungibiles*); (*e*) divisible and indivisible; (*f*) "singular" things (*res singulares*) and "unversalities" of things (*universitates rerum*).

Considered according to the mode by which the thing or property might be transferred, there was the ancient distinction, abolished by Justinian and eliminated from his system, between *res mancipi* and *res nec mancipi.*

Considered according as the thing or property could or could not be the object of private ownership, there was the distinction between *res in commercio* and *res extra commercium.*

Each of these classes will be presently explained.

Justinian, in his *Institutes,*[1] and following Gaius,[2] enunciates a threefold division of private law according as it relates either to (*a*) persons, (*b*) things, and (*c*) actions, and within the category of "things" there are included not only material tangible things, but also such immaterial and intangible abstractions as rights of succession, rights over the property of other persons — *e.g.* servitudes — and rights created by obligation.[3] In respect of this division Justinian may be said to regard (*a*) persons as the *subjects* of rights; (*b*) things—whether tangible or intangible—as the *objects* of rights; and (*c*) actions as the means of enforcing rights.

Justinian's threefold classification of things or property does not, as a logical and scientific division, conform to modern standards or stand the test of modern criticism.[4] As a consequence of this threefold division, the Roman Law relating to things or property forms the greater part of the law of the *Institutes,* including, as it does, the law dealing with the acquisition of full rights of ownership and that dealing with the acquisition of limited rights of property less than full ownership, or rights over property owned by other persons (*jus in re aliena*), such as rights of servitude and of usufruct; also the law of succession in its various aspects, and the law of obligations, or those rights and

[1] I. 2, 12.

[2] Gaius, *Institutes,* i. 8.

[3] This threefold division of private law was traditional amongst Roman lawyers, inherited doubtless from pontifical jurisprudence, but it was neither inherent nor fundamental in the system, for, apart from institutional writers, it does not govern the arrangement of the Digest, the Edict, the Twelve Tables, or any of the Imperial Codes (see Goudy, *Trichotomy in Roman Law*).

[4] See Moyle, *Institutes of Justinian,* 4th ed., 189.

duties that are created by contract, or by delict, or by analogous circumstances.[1]

The Justinianian Law, unlike most modern legal systems, does not regard and treat of law as an aggregate of rights and obligations based upon a fundamental division of rights into those that are either "real" or "personal," according as the right is one to the preservation of both person and property from violation, or is one created by contract, or by delict, or by their analogues against particular individuals. Modern law draws a distinction between rights to the preservation of one's person and one's property from violation at the hands of others that can be asserted against any one violating them, and those rights that are available only against particular individuals; and the distinction is connoted by the expressions rights *in rem* and rights *in personam* respectively.[2]

In the Roman system, as expounded in the *Institutes*, a very limited view of rights and their corresponding duties is taken, and they are only dealt with in so far as they are created by contract, or by delict, or by analogous relations, and personal rights *in rem* are not, as such, specially treated.

The explanation of this is probably that the *Institutes* did not so much seek to present a scientific classification of things as to explain the nature of the different kinds of property recognised by the Roman Law, and the ways in which such property might be acquired and transferred. In this view, rights and obligations being regarded as "things," inasmuch as they can form part of a person's property, the *Institutes* deal with the various modes in which rights and obligations can be created; the rights and obligations created by contract and quasi-contract, delict and quasi-delict, are consequently included within the sphere of the law relating to things.[3]

(a) *Corporeal and Incorporeal Things*

This is the fundamental and most important division of things in the Roman Law,[4] along with which that into *res singulae* and *res universitates* is of primary importance.[5] "Corporeal" things (*res corporales*) are such material objects as can, from their nature, be touched by reason of having a *corpus* or body, "such as land, a slave, a garment, money."[6] "Incorporeal" things are those objects that do

[1] The law of obligations, and that relating to wills and successions, properly form independent branches of law, and are usually so treated by modern jurists and systematic writers on Roman Law.

[2] Rights *in rem*, in the modern view, are thus either (*a*) personal or (*b*) proprietary, according as the claim is one against all the world for the preservation from injury of either one's (*a*) person or (*b*) lawful property.

[3] The law relating to things occupies the whole of the second and third books of the *Institutes* and a portion (titles 1-5) of the fourth book.

[4] Justinian, *Inst.* ii. 2 pr.; Gaius, *Inst.* ii. 12; *Dig.* i. 8, 1, 1.

[5] *Cf.* Moyle, *Inst.* 186.

[6] Justinian, *Inst.* ii. 2, 1; Gaius, *Inst.* ii. 13; *Dig.* i. 8, 1, 1.

not possess a *corpus* or body, and which, consequently, cannot be touched, such as a right of inheritance, a right of usufruct, and a right under an obligation;[1] they are, in other words, as put by the jurist Gaius,[2] such things as have merely an abstract existence in law.[3] A *res incorporalis* is thus an intangible and immaterial creation of the law alone.

(b) *Movable and Immovable Things*

A "movable" thing (*res mobilis*) is any corporeal thing that is capable of being moved, or of moving itself, without deterioration,[4] and consequently includes every kind of property except land and things attached to, or pertaining to the land. An "immovable" thing (*res immobilis*) is something that, from its inherent nature, cannot be moved, such as land, and things pertaining or attached to the land, such as houses, trees, unreaped crops, and things of a similar nature.[5]

(c) *Consumable and Inconsumable Things*[6]

These are such things as either are or are not respectively diminished or extinguished, and which are so intended to be, in the course of their ordinary and natural use, such as food, and money, and wine.

> It is obvious that a consumable thing cannot be the object of a true usufruct, as a usufructuary is bound to preserve intact the substance of the object of the usufruct; he enjoys his right *salva rerum substantia*.[7]
>
> Money is "consumed" or extinguished by being spent, or otherwise so mixed with other people's money as to render it impossible to determine to whom the particular coins respectively belong.[8]

(d) *Fungible and Non-Fungible Things*[9]

"Fungible" things were those that are usually reckoned collectively as a class (*genus*), such as grain, fruit, money, wine, oil; in other words,

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[1] Justinian, *Inst.* ii. 2, 2; ii. 2, 3; *Dig.* i. 8, 1, 1.

[2] *Inst.* ii. 14.

[3] *Ea quae in jure consistunt.*

[4] *Cf.* Girard, *Droit Romain*, 5th ed., 243.

[5] In modern law movables are governed by the law of the owner's domicile, as by their nature they can be carried with him from place to place; immovables, on the other hand, are governed by the law of the territory where they are situated.

[6] *Res quae usu minuuntur vel consumuntur. Res q. u. non m. vel consumuntur.*

[7] *Dig.* vii. 1, 1; Justinian, *Inst.* ii. 4 pr. *Cf.* Sohm, *Institutes of Roman Law*, 3rd ed., 340. See also on "Usufruct," *post*, p. 260.

[8] *Cf.* Sohm, *ut supra*, 304.

[9] *Res fungibiles; res non fungibiles.* See Sohm, *Institutes of Roman Law*, 3rd ed., 305; Girard, *Droit Romain*, 5th ed., 244; Sandars, *Institutes of Justinian*, 328. The classical name for a *res fungibilis* was *Quantitas* (Poste, *Institutes of Gaius*, 4th ed., 324; Moyle, *Institutes of Justinian*, 4th ed., 392).

as expressed by the Roman jurists, *res fungibiles* were such things as are ordinarily estimated by weight, number, or measure.[1]

"Non-fungibles," on the other hand, were such things as are regarded individually (*in specie*) and not as a class (*in genere*), and one of which cannot represent another.

The division of things into "fungibles" and "non-fungibles" is based upon the distinction, well recognised by the Roman jurists, between the *genus* and the *species*, or the whole of a class of objects and a particular unit or object of a class.

In general, if a person was under obligation to supply fungibles, the obligation to supply such was fixed with reference to a general class and according to a general standard of measure, but was not to supply individually ascertained units. Thus in a loan of corn the obligation was to return an equal quantity of corn of equal quality, although the individual grains of corn were quite different from those in the quantity originally lent. The separate units composing "fungibles" were regarded as equal, even though they might not be absolutely identical, so that an equal quantity of the same general class (*genus*) is as good as the original quantity; the one quantity thus represents the other, and is equivalent to it.

The classes of things which can, in this way, represent each other are said to be considered *in genere*, while those that cannot do so are regarded *in specie*; the loan of a picture, for example, involves an obligation to restore the identical picture, which is thus regarded *in specie*, or as a particular unit of a class distinct from all others in the class.

While it is either the nature of the thing itself or the general usages of commerce which determine those things that are ordinarily reckoned according to weight, number, or measure, and thus fall within or without the category of "fungibles," it is nevertheless not the nature of a thing, but the intention of parties that alone causes it to be regarded either as *in genere* or *in specie*, and thus, if parties so wished, a thing might be regarded by them *in genere* that is ordinarily considered *in specie*, or conversely.[2]

(e) *Divisible and Indivisible Things*

A "divisible" thing is such an object as is capable of being divided into various parts without thereby impairing its value; as, for example, wine, corn, land, or cloth.

An "indivisible" thing, on the other hand, is something that cannot be separated into parts without either diminishing or destroying its value, such as a coat, or a horse, or a ship.

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[1] *Res quae pondere, numero, mensura ve constant* (*Inst.* iii. 14 pr.; *cf.* Gaius, *Inst.* iii. 90).

[2] See Girard, *Droit Romain*, 5th ed., 244; also Sandars, *Institutes of Justinian*, 328.

(f) *"Singular" Things (Res singulares) and "Universalities" of Things (Universitates rerum)*

This division connotes the distinction between things regarded individually and those considered collectively. Thus an ox is a single or particular thing (*res singularis*), but a herd of oxen is a collection of individual things regarded collectively as itself constituting a single thing; so also an inheritance (*haereditas*), made up as it is of a collection or totality of corporeal or incorporeal individual things, constitutes a *universitas rerum*. In this way there arises the distinction between "singular" and "universal" succession; "singular succession" is the acquisition of particular units or things, whereas "universal succession" is the acquisition of things not individually, but merely as forming parts of a collective whole, as in the case of the succession of an heir to the estate (*haereditas*) of the deceased person.

(g) *Res mancipi and Res nec mancipi*

The distinction between these two kinds of things consisted in the mode by which the property could be transferred. The distinction is, however, of merely historical interest, for it found no place in the system of Justinian; that Emperor "abolished all remains of the distinction between *res mancipi* and *nec mancipi*, between full ownership, bonitarian ownership, and *nudum jus Quiritium*, placing movables and immovables on a footing of perfect equality so far as their direct conveyance was concerned."[1] The distinction between *res mancipi* and *nec mancipi* pertained to the strict *jus civile*, and was of importance in the time of Gaius.[2]

Res mancipi were those things the full ownership (*dominium*) of which could only be transferred by either of the solemn formal modes of the strict *jus civile* known as *mancipatio* and *in jure cessio*.[3]

Res nec mancipi were things of which the ownership could pass by mere delivery or "tradition."[4] *Res mancipi* included those things that, presumably, were of most value to an early agricultural community, and constituted the more important accessories of a farm;[5] they comprised slaves, oxen, horses, mules and asses, land in Italy itself, and rural servitudes attached to such land; all other things, including provincial

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[1] Muirhead, *Roman Law*, 2nd ed., 392; *Code*, vii. 31.
[2] Gaius, *Inst.* ii. 18 (Poste, 133).
[3] Gaius, *Inst.* ii. 22.
[4] Gaius, *Inst.* ii. 19.
[5] Poste, *Institutes of Gaius*, 4th ed., 135.

lands generally, implements of husbandry, wild animals, and elephants and camels, and most movables, were *res nec mancipi*.[1]

Various theories as to the reason for the distinction between *res mancipi* and *nec mancipi* have been advanced. Poste appears to follow[2] Maine's view that *res mancipi* were those things that were specially regarded as property by, inasmuch as they were of most value to, an early agricultural community; *res nec mancipi*, on the other hand, being such things as came to have a proprietary value at a later stage of development; Muirhead thinks that the distinction was introduced by Servius Tullius, and that *res mancipi* were those things in respect of which a man was rated in the *census*.[3] The view more generally adopted now is that the distinction was based upon a still earlier one between family property (*familia*) and private property (*pecunia*), the former alone being *res mancipi*.[4]

(h) *Things in Commercio and Things Extra Commercium*

Everything that was capable of being held in private ownership was said by the Roman Law to be *in commercio* or "in commerce"; in other words, was capable of being the object of commercial dealing between private individuals.

Things *extra commercium*, on the other hand, were things that could not be the objects of private ownership, and so were outside (*extra*) private commercial dealing. Things *in commercio* and *extra commercium* were otherwise styled *in patrimonio* and *extra patrimonium*.[5]

Things might be *res extra commercium*, or "outside commerce," either (*a*) because they were, from their essential and inherent nature, incapable of ownership, or (*b*) because although from their nature quite capable of being the object of private ownership, the law placed them outside the sphere of private ownership.

SECTION 68.—JUSTINIAN'S CLASSIFICATION OF THINGS EXTRA COMMERCIUM

Justinian, in the *Institutes*,[6] classifies *res extra patrimonium* (or *commercium*) under four heads, namely—(1) things common to all mankind

[1] Gaius, *Inst.* ii. 140. *Cf.* Gaius, *Inst.* i. 120; Ulpian, *Frag.* xix. 1; Muirhead, *Institutes of Gaius*, 79 *et seq.* See also Muirhead, *Roman Law*, 2nd ed., 61, 62.

[2] *Ut supra*, 135.

[3] Muirhead, *Roman Law*, 2nd ed., 62.

[4] Moyle, *Institutes of Justinian*, 4th ed., 17, note (*q.v.*). See also on *Res mancipi* and *nec mancipi*, in addition to the authorities already cited, Hunter, *Roman Law*, 4th ed., 260-262; Sohm, *Institutes of Roman Law*, 3rd ed., 305-307; Girard, *Droit Romain*, 5th ed., 249, 250.

[5] Justinian, *Inst.* i. 1 pr. *Cf.* Moyle, *Institutes of Justinian*, 193.

[6] *Inst.* ii. 1 pr.

(*res omnium communes*); (2) public things, or things belonging to the State (*res publicae*); (3) things belonging to a corporate body (*res universitatis*); and (4) things belonging to no man in respect of a certain sanctity attached to them (*res nullius*).[1]

(a) *Res communes* were things common to all mankind, or things of such a nature that all the world might equally enjoy them, as, for example, the open air, the open sea, running water of a natural stream (*aqua profluens*), the bed of the sea, and the seashore up to the limit of the highest winter flood;[2] also light, the sun, the moon, or the stars. *Res communes* were so styled because from their very nature they are inherently incapable of being appropriated to the exclusive use of any particular person, or body of persons, and their use and benefit is common to all mankind.

Res communes are not, strictly speaking, "things" in the true legal sense of the term, for a "thing" is that which can be the object of a legal right, or that can form part of a person's property;[3] and it is just because these things mentioned as *res communes* cannot be the objects of rights that they are styled "common."[4] "Common things" are truly regarded as things having no owner or otherwise as *res nullius*.[5]

> Although the open sea is included amongst "common things" as incapable of appropriation, yet modern public international law recognises that certain parts of the sea nearest to the coast of any particular country are susceptible of property rights in the form of exclusive rights of navigation and fishing, and also exclusive rights of use, and for purposes of defence.[6]

(b) *Res publicae*, or "public" property, were things owned by the State, and not subject to exclusive rights of private individuals, such as public roads, harbours, navigable rivers, and public buildings and palaces.[7] Under the Justinianian law the term *res publicae* comprised only these things that were intended for the common use of all persons in the State and which *directly* benefited all such persons. Things belonging to the State which only *indirectly* benefited individual members of the community, such as things used in the administration of State depart-

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[1] See on this use by Justinian of the term *res nullius*, *post*, p. 208.

[2] Justinian, *Inst.* ii. 1, 1; ii. 1, 3; *Dig.* i. 8, 2, 1; i. 8, 4; i. 16, 96.

[3] See *ante*, p. 197.

[4] *Cf.* Sohm, *Institutes of Roman Law*, 3rd ed., 303.

[5] See on *res communes*, Hunter, *Roman Law*, 309, 310.

[6] The extent of the exclusive rights which any given State may claim to exercise over the sea that washes its coast is a matter of controversy, but it is generally considered to be covered by the range of a cannon; that distance is, however, in itself, uncertain in view of the great variety and range of modern large guns.

[7] Justinian, *Inst.* ii. 1, 2; *Dig.* i. 8, 4, 1; *Dig.* xlvii. 10, 13, 7.

ments—such as things used for the paving and lighting of streets, or the maintenance of schools—came within the sphere of "private things" (*res privatae*), and as such were regarded as *in commercio*. The admission, however, of such things within the sphere of private law as the objects of private ownership and commercial dealing only took place after the recognition of collective communities and, later, of the State itself, as private juristic persons; originally, and until then, everything that belonged to the Roman people or State (*Romanus populus*) was *res publicae* or public property, and, as such, was placed *extra commercium*, whether or not its use and benefits to the individuals in the community were direct or indirect.[1]

The seashore was included by Justinian amongst "common" and not public things,[2] because it was not regarded as the property of the State, but merely as under its supervision and protection in order to ensure that none of the ordinary common uses of the shore were lost or interfered with by the acts of private individuals.[3] Thus persons were prohibited by the Praetor from making any erections, or doing any acts on the seashore, if such interfered with navigation or public use.[4]

The terms "public" and "common" are sometimes employed in the Roman Law as synonymous, for "public things" and "things common" resembled each other in that the use of them were enjoyed by people generally; but they were distinguished from each other in that "common" things were really regarded as having no owner and being from their nature so incapable; or, in other words, were regarded as *res nullius*, whereas "public" things were the property of the State.

Navigable rivers being regarded as *res publicae*, the public were considered as entitled to use the banks of such rivers for all necessary purposes in connection with and incidental to the navigation of the river itself, such as bringing the vessel to the bank and fastening ropes to the trees on the bank, or placing the cargo there, if necessary to do so; but the banks of a navigable river, and the trees upon them, remained, nevertheless, the private property of the owners of the land which they adjoined:[5] in other words, while the banks of navigable rivers were the property of the adjoining owners, the use of the banks

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[1] Sohm, *Institutes of Roman Law*, 3rd ed., 303. *Cf.* Moyle, *Institutes of Justinian*, 4th ed., 193, sec. 2.

[2] *Inst.* ii. 1, 1.

[3] *Dig.* xlii. 8, 3 pr. *Cf.* Hunter, *Roman Law*, 4th ed., 311; Sandars, *Institutes of Justinian*, 91; Mackenzie, *Roman Law*, 7th ed., 168.

[4] *Dig.* xliii. 8, 3, 4.

[5] Justinian, *Inst.* ii. 1, 4; *Dig.* i. 8, 5.

for purposes necessarily incidental to the navigation of the river was open to the public, and the rights of the "riparian" owners or owners of the banks (*ripae*) were legally qualified or restricted to that extent.

The Praetors were in the habit of prohibiting by interdict[1] all impediments to the free navigation of the river, or to the use of the banks,[2] and even prohibited an owner who possessed land on both sides of a river from connecting his property by a private bridge.[3]

The right of fishing in navigable rivers was, by the Roman Law, common to all without restriction.[4]

Just as the impeding of the free navigation of a river was prohibited, so the Praetors interdicted anyone from obstructing or damaging, or in any way interfering with the legitimate use and enjoyment of, the public roads.[5] The public roads and highways were constructed, and intended to facilitate communication and travel between one part and another, and the use and benefit of them was enjoyed equally by all members of the public, whether citizens of the State or strangers lawfully in it.

(c) *Res universitatis.*—This term was applied, in the Roman Law, specially to property belonging to a particular city or municipality that was owned by such corporate body specially for the use and benefit of the public, and the term was employed with special reference to public theatres, racecourses (*stadia*), and market-places.[6]

(d) *Res nullius.*—This is the fourth subdivision of *res extra nostrum patrimonium* (or *commercium*) according to Justinian.[7] In using this term to signify a class of things *extra commercium*, Justinian is employing it in a limited and special sense to signify certain kinds of property which were more or less consecrated to religious purposes, or were invested with more or less of a sacred character, which put them "outside commerce," and which consequently were regarded as incapable of being the objects of rights of private ownership.[8] A *res nullius* is strictly, according to the common use of the term, a thing for the time being unappropriated by anyone but capable of being acquired, and, as

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[1] *Dig.* xliii. 14, 1; xliii. 12, 12, 1 pr.; xliii. 13, 1, 11.

[2] *Dig.* xliii. 12, 1 pr.

[3] *Dig.* xliii. 12, 4.

[4] Justinian, *Inst.* ii. 1, 2. See, upon rivers and their banks, Hunter, *Roman Law*, 313.

[5] See, upon roads and their varieties, Hunter, *Roman Law*, 311, 312; and upon *res publicae* generally, Hunter, *Roman Law*, 310-314. The roads or thoroughfares in the city of Rome itself were under the care and jurisdiction of the Curule Aediles.

[6] Justinian, *Inst.* ii. 1, 6; *Dig.* i. 8, 6, 1.

[7] Justinian, *Inst.* ii. 1 pr.

[8] Justinian, *Inst.* ii. 1, 7.

such, is truly a *res in commercio* (or *in nostro patrimonio*).[1] Justinian, however, employs the term *res nullius* to denote these thing designated by Gaius as *res divini juris*, as contrasted with *res humani juris*, or things that are respectively the subjects of divine and of human right.[2] *Res divini juris* were those things regarded as *sacrae*, *religiosae*, or *sanctae*. *Res sacrae* or "sacred" things were, according to the old Pagan Roman Law, things that had been duly consecrated[3] to the gods above, such as temples and their incidental appointments; while *res religiosae* were things devoted to the gods below, such as burial-grounds.[4]

The ground on which a sacred building had once stood remained sacred, and thereby incapable of being put to profane uses, even after the building had been destroyed.[5]

Ground in which a body had been buried became thereby a *res religiosa*, and as such *extra commercium*, provided the person who buried the body was the owner of the ground, or had the consent of the owner, and the soil was not already *sacrus*, *religiosus*, or *sanctus;* but the restriction only remained in force so long as the body was not disinterred and removed elsewhere.[6] *Res sanctae* were things hallowed and invested with a special sanctity on account of the particular use to which they were put, although not themselves *sacrae* or sacred in the strict sense of the term, and which were protected against injuries by having severe penalties attached to their violation; of such kinds of things were the walls and the gates of a city.[7]

In classifying *res sacrae*, *religiosae*, and *sanctae* as *res nullius* Justinian used the term in a limited sense, but in so doing he was following and was probably influenced by .Gaius' classification of things. Gaius divides things (*res*) into two great classes, namely, those (*a*) *divini juris*, or the objects of divine right, and (*b*) *humani juris*, or the objects of human right;[8] things *divini juris* were subdivided into things *sacrae*, *religiosae*, and *sanctae*, while things *humani juris* were subdivided into things (*a*) public (*res publicae*) and (*b*) private (*res privatae*); public things were further subdivided into (*a*) corporeal (*res corporales*) and (*b*) incorporeal (*res incorporales*), while "private" things were subdivided into *res mancipi* and *res nec mancipi*. Corresponding to Gaius' division of

[1] *Cf.* Moyle, *Institutes*, 4th ed., 198, sec. 7, on this point.

[2] Gaius, *Inst.* ii. 1, 2, 3.

[3] In order to properly consecrate a place and so render it a *res sacra*, it required to have been dedicated by a pontiff, with the sanction originally of the Roman people, then later of the Senate, and ultimately of the Emperor (*Dig.* i. 8, 9; i. 8, 6, 3; *Inst.* ii. 1, 8.

[4] Gaius, *Inst.* ii. 4; Justinian, *Inst.* ii. 1, 8, 9. Cf. *Dig.* i. 8, 6, 3; *Code*, i. 2, 21.

[5] Justinian, *Inst. ut sup.*; *Dig. ut sup.*

[6] *Cf.* Justinian, *Inst.* ii. 1, 9; Gaius, *Inst.* ii. 6; *Dig.* i. 8, 6, 4; xi. 7.

[7] Justinian, *Inst.* ii. 1, 10; *Dig.* i. 8, 8; i. 8, 9, 3; i. 8-11; Gaius, *Inst.* ii. 8

[8] Gaius, *Inst.* ii. 2.

res into those *divini juris* and *humani juris*, Justinian divides things into those *extra nostrum patrimonium* (or otherwise *extra commercium*), and those *in nostro patrimonio* (or otherwise *in commercio*).[1] Things *extra nostrum patrimonium*, according to Justinian, comprised *res communes*, *publicae*, *universitatis*, and *nullius*, the last including *res sacrae*, *religiosae*, and *sanctae*; things *in nostro patrimonio* were subdivided by Justinian into (*a*) corporeal (*res corporales*) and (*b*) incorporeal (*res incorporales*).

Justinian's designation of Gaius' *res divini juris* as *res nullius*, and as such *extra nostrum patrimonium*, is inaccurate and incomplete, for, as has been already mentioned,[2] a *res nullius* or "a thing that is the property of nobody" is truly something that is for the present unappropriated but is capable of being acquired, and is consequently *in nostro patrimonio*.

A thing may be a *res nullius*, or an unappropriated thing, because it is either (*a*) property for the time being without an owner but from its nature quite capable of being held in private ownership, examples of which, according to Justinian, are wild animals, treasure trove, derelict or abandoned things, property captured in war, islands formed in the sea, and such like; or (*b*) property that, either from its particular nature or from the special use to which it is put, is regarded by the law as incapable of being the object of ownership, of which there may be instanced, as examples, the sun, the moon, or the stars, the atmosphere, and such like;[3] and *res sacrae*, *religiosae*, and *sanctae*.

Both Justinian and Gaius, in making their primary divisions of things, were only concerned to distinguish between those things that fell within the sphere of "private" law and those that did not, but in identifying *res nullius* solely with the *res divini juris* of Gaius, Justinian falls short in logical accuracy and completeness.[4]

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[1] Justinian, *Inst.* ii. 1 pr.

[2] *Ante*, p. 206.

[3] Although these objects are classed by the Roman Law as *res communes*, they are not "things" in the true sense of the term; they are really *res nullius*, inasmuch as from their particular nature they are incapable of any form of ownership, whether private or public. Cf. *ante*, p. 204.

[4] *Cf.* Hunter, *Roman Law*, 4th ed., 256.

CHAPTER II

OWNERSHIP AND POSSESSION

OWNERSHIP is the most absolute power that the law gives to a person, whether natural or juristic, over any particular thing.

In the Roman Law this highest form of the right of property was signified by the term *dominium*, and sometimes by *proprietas*. The Roman conception of ownership underwent a gradual historical development.

Dominium or *dominium ex jure Quiritium*,[1] in its original and strict sense, was the only legal ownership recognised by the *jus civile;* it could, therefore, only be acquired by Roman citizens or by persons enjoying the *jus commercii;* it could only be exercised over such things as were *in commercio;* and it could only be acquired or transferred by one or other of the modes peculiar to the strict *jus civile*, such as *mancipatio*[2] or *in jure cessio*.[3]

Dominium comprised and was the sum-total of four lesser rights, namely (1) the right of use (*jus utendi*); (2) the right of enjoying the fruits or products (*jus fruendi*); (3) the right of consumption or of disposal (*jus abutendi* or *disponendi*); and (4) the right of vindicating or claiming the property from third parties unlawfully possessing it (*jus vindicandi*).

The Praetors came to recognise a form of ownership which was not *dominium* in the strict sense, but which was practically equivalent to it by reason of the person's possession being protected by a praetorian interdict. This form of protected possession is known by commentators as "equitable," or "bonitarian," or "bonitary" ownership in contradistinction to *dominium ex jure Quiritium*. The Praetors granted such interdicts for the protection of possession in those cases where the title of a *bonâ-fide* possessor was defective owing to the *dominium* not having been legally transferred. The expression *in bonis habere*[4] was employed by the jurists to signify a possession which was,

[1] "Quirites" was an old name for the Romans. *Cf.* Justinian, *Inst.* i. 2, 2.

[2] See *post*, p. 214.

[3] See *post*, p. 215.

[4] The term *bona* or "goods" was used in the Roman Law to signify all kinds of property, of whatever nature, to which a person might have right or title.

in effect, full ownership because it was protected by the Praetor, but which was not technically *dominium ex jure Quiritium*. Praetorian ownership was thus opposed to "quiritary" ownership or *dominium*, and the remedies afforded by the Praetor, whether in the form of an action or of a defence (*exceptio*),[1] had the effect of reducing the old ownership of the *jus civile* to a bare right or form (*nudum jus Quiritium*).[2]

Although in the time of Gaius the distinction between *dominium* and *in bonis habere* is frequently evident it had yet become, even by that time, for the most part of little practical importance; by the time of Justinian there was but one *dominium* left, and the only contrast was between that and possession (*possessio*).[3]

Justinian abolished the distinction between "civil" ownership or *dominium* proper and "equitable" or "bonitarian" ownership,[4] and the only form of ownership recognised by the Justinianian law was "possessory" or praetorian ownership, which was protected and enforced by a "real" action known as a *vindicatio*.

As distinguished from ownership (*dominium*) there is possession (*possessio*). The two rights are entirely distinct, and the ownership of property may be with one person whilst the possession is with another, as, for example, in the cases of the pledger and pledgee, lender and borrower, lessor and lessee; in such cases as these the possessor only exercises and intends to exercise the possessory rights of the owner, but has not the intention (*animus*) of himself dealing with the property as owner. *Possessio* in the Roman Law had two significations: it might be either (*a*) a mere right of physical control or detention of property unaccompanied by any intention of dealing with the property as one's own; or (*b*) the physical control or detention of the thing with the added intention of dealing with the property as one's own. The former case—*i.e.* (*a*)—was known as "detention" (*detentio*) or "natural possession" (*possessio naturalis*), and gave no rights in or to the thing itself; the person possessing "naturally" was said "to be in possession" (*in possessione esse*) or otherwise to have *custodia*, or mere custody, of the thing.

The latter case—*i.e.* (*b*)—was alone true juristic possession, there being added to the intention to retain the physical control or custody of the property the determination, whether in good or in bad faith,

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[1] The *actio publiciana* and the *exceptio rei venditae et traditae*.

[2] *Cf.* Sohm, *Inst.*, 3rd ed., 311. See also on "bonitarian ownership," Hunter, *Roman Law*, 4th ed., 263-265.

[3] Moyle, *Institutes of Justinian*, 4th ed., 197, 198.

[4] *I.e.* between *dominium ex jure Quiritium* and *in bonis habere*.

to retain and deal with it as one's own as against all the world.[1] The juristic possession only was *possessio* in the strict sense of the Roman Law, and as such was sometimes still "civil" possession (*possessio civilis*) in contradistinction to "natural" possession; and juristic possession alone was protected by the praetorian remedies of the possessory interdicts granted either for retaining or for recovering possession of property.[2] Possession, according to the Roman Law, was thus either "natural" or "civil" according as there was or was not present the *animus possidendi*, or the intention of holding and dealing with the property as owner.

Possession, in the strict sense, and as a right lower than ownership but higher than custody, might, under the older law, be converted into *dominium* by means of "usucapion" (*usucapio*)[3] operating through lapse of time, provided that the possessor had acquired the property on a good title (*ex justa causa*), and in good faith (*in bonâ fide*). Only Roman citizens or persons enjoying *commercium*, in respect of which they were competent to acquire "quiritary" ownership, could acquire *dominium*, and consequently non-citizens could not convert their possession into *dominium* whatever degree of *animus possidendi* might be present; under the later law, however, the Praetors protected such possession by opposing "praetorian" ownership to "quiritary" ownership. The remedies given to the possessor in good faith by the Praetor's edict, whether in the form of an action at the instance of the possessor, or a defence available to the possessor against the true owner asserting his *dominium*, did not actually make the possessor's title that of true *dominium*, but they did in practical effect render the possessor owner by reducing the rights of the true owner to a bare and empty form.[4]

Justinian, as has been already mentioned,[5] abolished "quiritary" ownership, in favour of praetorian or possessory ownership; but the abolition was merely formal, for praetorian ownership, and acquisition, based upon the principles and modes of the *jus gentium* and not upon the forms of the old *jus civile*, was, in fact, the only form recognised in practice by that time.[6]

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[1] Such determination was known as the *animus possidendi*.

[2] The "possessory" interdicts under the Justinianian law were the interdicts (a) *uti possidetis*, (b) *unde vi*, and (c) *de precario*; the first was for retaining, and the other two were for recovering possession.

[3] See *post*, p. 234.

[4] *Nudum jus Quiritium*.

[5] *Ante*, p. 210.

[6] See upon upon ownership and possession generally, Sohm, *Institutes of Roman Law*, 3rd ed., 330 *et seq.*; Moyle, *Institutes of Justinian*, 4th ed., 196 *et seq.*; Poste, *Institutes of Gaius*, 4th ed., 151 *et seq.*; Buckland, *Principles of Roman Private Law* (1912), 64-83; Girard, *Manuel de Droit Romain*, 5th ed., 258-281.

SECTION 69.—REAL RIGHTS AND PERSONAL RIGHTS

The Roman Law recognised an important distinction between two different kinds of rights to property, according as a person was already the owner of it, or was entitled to compel the owner to transfer the ownership to him. The distinction has been connoted by the mediaeval commentators in the expressions *jus in re* and *jus ad rem* respectively.[1]

A right *in re* or "right *in* a thing" signified that the person had already acquired the ownership of the thing (*res*) and was entitled to exercise his rights as owner directly over the property without reference to any particular person more than another, but as against everybody else; whereas a *jus ad rem* or "right *to* a thing" signified that a person was not yet owner of the thing but merely had a right to compel the particular person who was the owner to transfer his ownership to him, and until such transference had taken place the right *in* the thing (*jus in re*) remained with the real owner, who was merely under a personal obligation, enforceable by an action, to transfer his rights of ownership.

The distinction connoted by the expressions *jus in re* and *jus ad rem* may be said to correspond to that between a right of property and a right under an obligation. A right of property is a "real" right, or one by which a person in respect of an already completed acquisition is entitled to deal directly with a particular thing (*res*) himself irrespective of any particular person, and the right can be asserted against everybody, being thus what is styled "absolute"; whereas a right under an obligation is a "personal" right because it merely entitles a person to compel some other particular person to act in some particular way.[2]

The distinction connoted by the expressions *jus in re* and *jus ad rem* is also denoted by the terms *jus in rem* and *jus in personam*, which signified respectively a right exercised directly over the object, and available against everybody, and a right that can be asserted only against a particular person.[3]

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[1] The Roman jurists did not employ those actual terms; they used expressions *jus in ea re* and *jus in corpore* in a descriptive but not in a technical sense. The mediaeval commentators came to employ the terms from the fact that by the Roman Law *dominium* gave rise to an action *in rem* for the recovery of the particular thing, and an *obligatio* gave rise to an action in *personam*. The commentators transferred the names of these actions to the rights which they protected. *Cf.* Mackenzie, *Roman Law*, 171, note 2; Holland, *Elements of Jurisprudence*, 8th ed., 129, for a history of the terms.

[2] *Cf.* Sohm, *Institutes of Roman Law*, 3rd ed., 307, 309; Mackenzie, *Roman Law*, 170, 171.

[3] Mackenzie, *ut supra*.

CHAPTER III

ACQUISITION OF THINGS[1]

THE Roman Law, prior to the time of Justinian, drew a distinction between "civil" and natural acquisition.

"Civil" acquisition was acquisition of property in one or other of the modes peculiar to the *jus civile*, or old Roman Law, such as *mancipatio*,[2] *in jure cessio*,[3] and *usucapio*,[4] which were available only to Roman citizens, or to persons enjoying the *jus commercii*, and were characterised by formality, solemnity, and publicity in their procedure.[5]

"Natural" acquisition was acquisition in modes based upon the rules and principles of, and recognised by, the *jus gentium*, and as contrasted with "civil" acquisition was characterised by the absence of solemnity, formality, and publicity, the legal right in such cases being usually acquired through the medium of possession.[6]

We have thus in the pre-Justinianian Law the antithesis between *acquisitio civilis* or *ex jure civili* and *acquisitio naturalis* or *ex jure gentium*. "Civil" and "natural" acquisition created "civil" and "natural" *dominium* or ownership, according to the particular mode in which the property was acquired.

The principal "natural" modes of acquisition were "occupation" (*occupatio*)[7] and "tradition" (*traditio*),[8] and there were also "accession" (*accessio*),[9] prescription (*praescriptio*),[10] and *fructuum perceptio*.[11]

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[1] *Dig.* xli. 1. *De rerum acquirendo dominio;* see Monro (C. H.) on this book and title of the *Digest* (Cambridge University Press, 1900).

[2] See *post*, p. 214.

[3] See *post*, p. 215.

[4] See *post*, p. 234.

[5] Property in single things could also be acquired "civilly" (*ex jure civili*) by *traditio*, *adjudicatio* (by bequest) and by mere operation of law (*lege*); "universal" modes of "civil" acquisition were arrogation, inheritance, *conventio in manum*, and the purchase of a confiscated estate (see also *post*, p. 229, under singular and universal succession).

[6] Sohm, *Inst.*, 3rd ed., 310.

[7] See *post*, p. 217.

[8] See *post*, p. 231.

[9] *Post*, p. 220.

[10] *Post*, p. 234 *et seq.*

[11] *Post*, p. 227.

SECTION 70.—MANCIPATIO

This was the name applied by the *jus civile* after the Twelve Tables, when coined money had been introduced, to a fictitious sale or transfer of property. Prior to the Twelve Tables *mancipatio* was not a fictitious or imaginary sale (*imaginaria venditio*),[1] but an actual conveyance for an actual consideration. *Mancipatio* as a mode of conveyance of property peculiar to the *jus civile* was competent only to Roman citizens and to such other persons as enjoyed the right of *commercium*.

The procedure associated with *mancipatio* involved the presence of at least eight persons, namely, the transferror and the transferee of the property, a *libripens* or balance-holder, and not less than five citizens above the age of puberty to act as witnesses to the employment of the formal words and the due performance of the formal acts required by the law. The five witnesses were representative of the community, and their presence gave publicity to the proceedings, which further derived their validity from the solemn use of the prescribed words and forms.

The transferee, placing his hand upon the thing to be transferred, claimed the property as his in a prescribed form of words,[2] at the same time striking the scales in the hands of the *libripens* or balance-holder with a piece of copper or bronze, which he thereupon gave to the transferror as a symbol of the purchase money.[3]

Mancipatio was the solemn sale or conveyance "by the copper and scales" (*per aes et libram*), peculiar to the early Roman Law. Certain kinds of property could be validly transferred only by this means, and as such were known as *res mancipi*.[4] The institution of praetorian or "bonitarian" ownership, as opposed to "quiritary" ownership, in effect abolished the distinction between *res mancipi* and *nec mancipi*, and by the time of Justinian *mancipatio* (as well as *in jure cessio*) as a "civil" mode of acquisition of property was obsolete, and the expression *dominium ex jure Quiritium* was expressly ordered to be expunged from the legal vocabulary, as being meaningless and only calculated to confuse students at the commencement of their legal studies.[5]

Under the earlier law *mancipatio* was employed not only as a means of actually transferring property, but was also adapted to a variety of

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[1] Gaius, *Inst.* i. 119.

[2] This was known as the *nuncupatio*.

[3] Gaius (*Inst.* i. 119) gives the form of words employed in the case of a sale of a slave:—"*Hunc ego hominem ex jure Quiritium meum esse aio isque mihi emptus esto hoc aere acneaque libra.*"

[4] See *ante*, p. 202.

[5] *Code*, vii. 25, 1.

purposes, such as adoption, emancipation, marriage (in the form of *coemptio*), and the making of testaments.[1]

SECTION 71.—IN JURE CESSIO

This was the name applied to a fictitious action at law for the recovery or for the declaration of a right of property; it was, in other words, "simply a *rei vindicatio* arrested in its initial stage."[2] *In jure cessio*, or "surrender in Court,"[3] was a mode of transferring property peculiar to the old *jus civile*, and, like *mancipatio*, it could only be employed by Roman citizens or by persons possessing the *jus commercii*.

> The parties to the fictitious action, previous to going into Court, arranged between themselves the terms upon which the transfer of the property was to be made—whether by sale, or exchange, or gift, or otherwise as the case might be—and then proceeded to go before a magistrate, such as the Praetor at Rome or the *Praeses* of a province. In Court the transferee, putting his hand upon the object of the transfer, claimed it in a set form of words;[4] the magistrate then asked the transferror if he had anything to say in reply to the claim, and on the transferror either, as previously arranged with the transferee, not disclaiming the assertion or remaining silent, the magistrate pronounced a decree or *addictio*, which had the effect of completing the transfer.[5]

Besides being employed for conveyance of property, *cessio in jure* was also used for other purposes, such as emancipation, adoption, manumission, creation of servitudes, transfer of *tutela legitima* of women, and the transfer of a *haereditas*.

Sometimes either *mancipatio* or *in jure cessio* might be employed, in

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[1] See upon *mancipatio* and its history, Muirhead, *Roman Law*, 2nd ed., 57 *et seq.* and 126 *et seq.*; Sohm, *Institutes of Roman Law*, 3rd ed., 48-53; Girard, *Manuel de Droit Romain*, 5th ed., 286-292; Poste, *Institutes of Gaius*, 4th ed., 135-137. *Cf.* also Buckland, *Elementary Principles of Roman Private Law*, 92-98; Gaius, *Inst.* ss. 119-123; ii. ss. 14*a*-22.

[2] Muirhead, *ut supra*, 137.

[3] In Roman legal procedure there was a sharp distinction between the expressions *in jure* and *in judicio*. The term *in jure* applied to the stage in the action at which the parties appeared in the Court of the Praetor to state their case, and in which the Praetor determined what, if any, issue was involved between them; the term *in judicio* referred to the subsequent proceedings before the *judex* or judge, after the Praetor, having fixed the point for determination, had formulated the issue between the parties and sent it to be decided by the *judex*. The issue or instructions thus sent to the judge by the Praetor was known as the "formula" for the trial of the action.

[4] "I say this [ ] is my property by quiritary right" (*Hunc ego* [ ] *ex jure Quiritium meum esse aio*), Gaius, *Inst.* ii. 24.

[5] Gaius, *Inst.* ii. 24.

which case the former was usually resorted to as being more convenient than *in jure cessio*, which involved appearance and procedure in Court.[1]

Sometimes it was requisite to employ both *mancipatio* and *in jure cessio*, as in the cases of emancipation, and of adoption of a *filiusfamilias*.

> Persons *alieni juris* and slaves could acquire property for their superiors by *mancipatio*, by means of a modification of the prescribed words which was permitted by the law, but it was incompetent for such person to do so by *in jure cessio*, as a modification of the form of words required by law was in such a case not allowed, and persons *alieni juris* being legally incapable of owning property for themselves, were technically incompetent to bring an action for the "vindication" of property, even although it was only fictitious.[2]

In jure cessio was still used in the time of Gaius for such purposes as adoption, creation of servitudes, transfer of tutory-at-law of women,[3] and the transfer of the right to accept an inheritance, but by the time of Justinian it was quite obsolete, for by that time *traditio* or mere delivery operated to transfer all corporeal things, and the other purposes for which it was employed had either themselves become obsolete or were attained in other and simpler ways.[4]

SECTION 72.—ORIGINAL AND DERIVATIVE ACQUISITION GENERALLY

By the time and in the law of Justinian the old distinction between "civil" and "natural" acquisition of ownership, although still surviving, had ceased to possess any significance, for praetorian ownership had come to be the only recognised ownership, and to it the natural or *jus gentium* modes of acquisition alone applied. The distinction in the modes of acquisition of property had thus by the time of Justinian come to be between those that were "original" and those that were "derivative." There is said to be "original" acquisition when there is obtained the ownership of property which either (*a*) has never previously been the property of any one, or (*b*) has been, but has ceased to be the property of any one. There is said to be "derivative" acquisition when a person acquires rights of ownership which at

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[1] Gaius, *Inst.* ii. 25.

[2] Gaius, *Inst.* ii. 87 and 96. See Poste, *Institutes of Gaius*, 174.

[3] Gaius, *Inst.* i. 168.

[4] Gaius, *Inst.* ii. 35-37. See upon *In jure cessio*, Muirhead, *Roman Law*, 2nd ed., 137; Poste, *Institutes of Gaius*, 4th ed., 136; Moyle, *Institutes of Justinian*, 3rd ed., 225; Sohm, *Institutes of Roman Law*, 3rd ed., 56; Girard, *Manuel de Droit Romain*, 5th ed., 292, 293; Buckland, *Principles of Roman Private Law*, 98. See also upon the uses to which the processes of *mancipatio* and of *in jure cessio* were adapted, *ante*, p. 215, note 4.

the time of his acquisition existed in another person, and which are therefore derived through the ownership of that other person.

> "Original" acquisition is a mode which operates independently of the ownership of any particular person; "derivative" acquisition, on the other hand, presupposes and depends upon the right of ownership of some particular person at the time of acquisition of the property. The person from whom the pre-existing rights of ownership are derived was known in Roman Law as the *auctor* or "author" of the person acquiring, to whose rights in the property the latter succeeds. It will thus be understood that there can be no *auctor* in "original" acquisition.[1]

The principal "original" modes of acquisition, according to the Roman Law, were what were respectively known as "Occupation" (*occupatio*) and "Accession" (*accessio*), and the "derivative" modes, under the law of Justinian, were "Tradition" (*traditio*),[2] "Bequest" (*legatum*), and "Adjudication" (*adjudicatio*).[3]

Section 73.—Original Acquisition

(1) Occupation (*Occupatio*).—This was a "natural" mode of acquisition recognised by the *jus gentium*, and the term signifies the taking possession of a thing which has either (*a*) never previously been owned by anyone, or (*b*) been previously owned by some one but has ceased to belong to any one, with the intention of becoming owner by means of the appropriation. "Occupation" was thus the appropriation of a *res nullius*, and it operated in Roman Law upon the principle that a thing belonging to no one becomes the property of him who appropriates it;[4] the appropriation, however, required to be with the intention of thereby becoming owner, and consequently there required to be present the *animus possidendi*.

Justinian mentions as examples of things capable of acquisition by

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[1] *Cf.* Sohm, *Institutes*, 3rd ed., 312 and 316; Mackenzie, *Roman Law*, 173.

[2] See *post*, p. 231.

[3] "Adjudication" was a judicial award of ownership of property held in common by two or more persons in an action for division or partition. The award (*adjudicatio*) had the effect of investing each person immediately with the sole ownership of the part awarded to him in place of his co-ownership of the whole. The actions in which property might be acquired by "adjudication" were those for the division of a dead person's property amongst his heirs (*actio familiae erciscundae*), for the division of property held in common (*actio communi dividundo*), and the action for fixing boundaries (*actio finibus regundis*). The acquisition of a right of ownership by a judicial "adjudication" must be distinguished from the protection of an already acquired right of ownership by a judgment in an action for the vindication of property (*rei vindicatio*). *Cf.* on "Adjudication," Roby, *Roman Private Law*, i. 422; Sohm, *Inst.*, 3rd ed., 315; Poste, *Institutes of Gaius*, 4th ed., 158.

[4] *Res nullius cedit occupanti.*

"occupation" wild animals, derelict property, property captured in war, and inanimate things such as gems, shells, or precious stones found on the seashore.[1] *Wild animals* included all beasts, birds, and fish of a nature which did not bring them within the category of domesticated or semi-domesticated, and they were *res nullius*, capable of acquisition by occupation by the first-comer, until actually appropriated. Thereafter, however, so long as such property remained in the possession of the person who had appropriated it, even although he had done so by trespassing, it could not be acquired by occupation by anyone else, unless and until the moment when it ceased to be in the power or possession of the occupant, and recovered its natural liberty.[2]

Tame or domesticated animals, such as horses, oxen, sheep, geese, fowls, did not become *res nullius* by the mere fact of straying, and the same rule was applied to certain wild animals such as pigeons, peacocks, and hawks in pursuit of game, which, although appropriated, are by nature and training in the habit of going off from and again returning whence they came. On the same principle, too, bees flying away in the course of swarming remained the property of him who had appropriated them, but only so long as he continued to pursue them; for the Roman Law regarded bees as naturally wild, and as such capable of acquisition by means of "occupation."[3]

The Roman Law drew a distinction between wild animals that were by nature ferocious and untamable (*ferae naturae*) and those that were half tamed or domesticated (*mansuefactae*), amongst which latter class are specially mentioned bees, peacocks, pigeons, and deer.[4]

In the case of wild animals (*ferae naturae*) that had been appropriated by occupation, rights of property only continued so long as there was actual detention of the object; rights of property in half-tamed animals (*mansuefactae*) were limited by the intention of returning (*animus revertendi*) on the part of the animal; but in the case of tame or domestic animals the rights of property were limited neither by detention, nor by mere intention to return on the part of the animal, but solely by the intention of the owner.[5]

Derelict things are things that have been abandoned by their owner with the deliberate intention of ceasing to own them. The Roman Law held that the intention on the part of the owner to terminate his owner-

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[1] See Justinian, *Inst.* ii. 1, 12-18.

[2] Justinian, *Inst.* ii. 1, 12, 13. *Cf.* Gaius, *Inst.* ii. 67; *Dig.* xli. 1, 1, 1; xli. 1, 3 pr., 1, 2.

[3] Justinian, *Inst.* ii. 1, 14-16; *Dig.* xli. 1, 5, 2-4; xli. 1, 5, 6; Gaius, *Inst.* ii. 68.

[4] *Inst. ut supra.*

[5] *Cf.* Poste, *Institutes of Gaius*, 165.

ship had the effect of making the property as *res nullius*, and, as such, capable of appropriation by anyone by occupation.[1] If, however, the property was not intentionally abandoned, but was merely lost, either by chance—as, for example, by falling from a carriage in motion—or through carelessness, or was thrown away, not with the intention of ceasing to be owner, but owing to necessity—as, for example, being "jettisoned" or thrown overboard during a storm in order to lighten the ship and secure its safety—it did not thereby become "derelict"; and it consequently continued to remain the property of the owner, to the effect that anyone appropriating it would be thereby committing theft.[2]

Inanimate things, such as precious stones, shells, and other things found upon the seashore (*in litore*) were regarded by the Roman Law as *res nullius*, and naturally belonging to whoever might find and appropriate them.[3] On the other hand, "treasure trove" (*thesaurus*), or anything valuable found hidden in the ground, and the owner of which was not known,[4] was subject to certain special rules, which, however, varied at different times. Such property was not regarded as wholly a *res nullius*, and the owner of the land on which it was found was always considered as having a certain interest in it. By a Constitution of the Emperor Hadrian, re-enacted by the Emperor Leo, and through whose enactment it became part of the law of Justinian,[5] if a man found treasure on his own land the whole belonged to him, but if a person found, by chance, treasure on the land of another, half belonged to the finder and half to the owner of the land on which it was found.[6] If the treasure was found on land that had no owner, such as a "sacred" or a "religious" place (*locus sacrus; locus religiosus*), the whole belonged to the finder, provided that it had been found quite by chance; for the law did not permit a person deliberately to search for treasure either on another man's ground or in "sacred" or "religious" places.[7]

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[1] Justinian, *Inst.* ii. 1, 47; *Dig.* xli. 7, 1.

[2] Justinian, *Inst.* ii. 1, 48; *Dig.* xli. 1, 9, 8.

[3] Justinian, *Inst.* ii. 1, 18; *Dig.* i. 8, 3.

[4] Cf. *Dig.* xli. 1, 31, 1; French Civil Code, Art. 716.

[5] *Code*, x. 15.

[6] This rule is embodied in the modern French law (see Civil Code, Art. 716). In Britain and some other countries "treasure trove" is not the property of either the owner of the land on which it is found or of the finder, but belongs to the Crown or sovereign authority, or to whomsoever the Crown may have transferred its rights. This rule appears to have for some time prevailed in the Roman Law, between the reigns of the Emperors Hadrian and Leo. See Moyle, *Institutes of Justinian*, 4th ed., 209.

[7] Justinian, *Inst.* ii. 1, 39; *Dig.* xli. 1, 63 pr. See, on "Treasure trove," Roby, *Roman Private Law*, i. 417.

Prize or Spoil of War.—The theory of the Roman Law regarded both the persons and the movable property of enemies captured as *res nullius*, and as, therefore, capable of being acquired by anyone by occupation,[1] but in practice the theory was modified, and movable property captured in war was disposed of and divided according to certain rules of military discipline, based upon the principle that property taken in war belongs to the State as *praeda* or booty. Immovable property taken in war appears to have been always regarded as belonging to the State.[2]

(2) ACCESSION (*Accessio*).[3]—This term signified that mode of original acquisition of property by means of which the owner of one thing becomes the owner of another thing in respect of being already the owner of the first, which is consequently regarded as the principal thing, and to which the other is only accessory or secondary.

"Accession" signified, in a general sense, the increase or development of property already belonging to a person, and the term is also used in a special sense to indicate the particular manner in which the increase became the property of the owner of the principal thing.

Accession might take place in natural, industrial, or civil modes.

Examples of accession are the "fruits" of animals in the form of their young, milk, hair, or wool;[4] the natural or industrial fruits or produce of land, such as crops; and civil fruits or profits, such as the rents of houses or interest upon money. These "fruits" are all accessory to the principal thing, because they could not come into existence independently of it, and they consequently accede or accrue to the principal thing, of which, indeed, they are really parts.

Property might be acquired by accession, moreover, not only by reason of being in reality part of the thing already belonging to the principal owner, but also even if it were either a *res nullius* or a *res aliena.*

Acquisition of a Res nullius by Accession.—Examples of acquisition by accession of *res nullius* given in Justinian's *Institutes* are what were styled *alluvio, insula nata,* and *alveus derelictus.*

(*a*) "ALLUVION" was the gradual and imperceptible addition to a person's land that adjoined a river by either the washing up or

[1] Justinian, *Inst.* ii. 1, 17; *Dig.* xli. 1, 5, 7; Gaius, *Inst.* ii. 69.

[2] Certain kinds of property had attached to them a *jus postlimini*, which excluded them from the category of *praeda* or booty, so that if recaptured they reverted to their original owners. The particular kinds of property possessing this character were lands, slaves, horses, mules, and ships used in war. See Sandars, *Institutes of Justinian*, 97.

[3] See Justinian, *Inst.* ii. 1, 19-37 inclusive.

[4] Justinian, *Inst.* ii. 1, 19; ii. 1, 37; *Dig.* xli. 1, 6.

depositing of sand or earth, or by the gradual and imperceptible receding of the water. Alluvion was thus the accession of land to land. The owner of land receiving an addition by alluvion acquired it by natural accession.[1] On the other hand, the temporary submergence of land through flood did not in any way affect the owner's right to the land.[2] But if a clearly distinguishable portion of an owner's land was forcibly torn away by the violence of a flood or storm and deposited on the land of another owner, it would become the property of the latter, by accession, if its former owner failed to claim it within such a time as the trees, if any, upon it had struck their roots in the new soil.[3]

(*b*) An island formed in a river by alluvion (*insula nata*) was considered by the Roman Law, as expounded by the later classical jurists, such as Ulpian, Gaius, and Paul, as acceding in common to the "riparian" owners, or those persons who owned the banks (*ripae*) on either side of the river,[4] and the extent of the right of each riparian owner was determined by drawing an imaginary line (known as the *medium filum*) down the centre of the river bed. If an island formed by alluvion in a river was nearer to one bank than to the other, by reason of being wholly on one side of the *medium filum*, it belonged entirely to the owner or owners of the nearer bank in proportion to the extent of their rights in the bank.[5]

(*c*) If a river changed its course, the former channel was regarded as *alveus derelictus*, or a derelict or abandoned bed, and as such it would strictly be a *res nullius*.

The Roman Law nevertheless awarded the ownership of an *alveus derelictus* to the riparian owners.[6] In such a case it would seem that the bed was not truly a *res nullius*, but merely that so long as it

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[1] Justinian, *Inst.* ii. 1, 20; Gaius, *Inst.* ii. 70; *Dig.* xli. 1, 7, 1. But if the banks of the river formed part of *agri limitati* or State lands acquired by conquest and granted to private individuals in plots, the increase by alluvion did not become the property of the owner of the plot (*Dig.* xli. 1, 16; xliii. 12, 1, 6. See Hunter, *Roman Law*, 276; Sandars, *Institutes of Justinian*, 99).

[2] Justinian, *Inst.* ii. 1, 24; *Dig.* xli. 1, 7, 6.

[3] Justinian, *Inst.* ii. 1, 21. There was in such a case acquisition of a *res aliena* by accession in the mode known as "avulsion" (*avulsio*). See *post*, p. 222.

[4] Cf. *Dig.* xli. 1, 65, 4, to the contrary, according to the opinions of Labeo, who, however, wrote nearly two centuries before the classical jurists named.

[5] Justinian, *Inst.* ii. 1, 22; *Dig.* xli. 1, 7, 3, 4; Gaius, *Inst.* ii. 72; *cf.* French Civil Code, Arts. 560, 561. The modern French law has adopted this rule of the Roman Law only with regard to private and non-navigable rivers. In the case of public navigable rivers, islands so formed belong to the State, failing any title or prescriptive right in anyone to the contrary.

[6] Justinian, *Inst.* ii. 1, 23; *Dig.* xli. 1, 7, 5.

was covered with water the enjoyment of it was public, and the rights of the owners of it were merely suspended.[1]

An island formed by alluvion in the sea, as distinguished from one formed in a river, was regarded by the Roman Law as a *res nullius* capable of acquisition by occupation by the first comer.[2]

Acquisition of a Res aliena by Accession.—Property that was *res aliena* might be acquired by accession, in the special forms of avulsion, adjunction, confusion, commixture, or specification.

(*d*) "AVULSION" (*Avulsio*) was the violent tearing away, as by the force of a flood, of a considerable and clearly distinguishable portion of an estate of one person and the depositing of it upon the land of another person. If the owner of the piece of land so "avulsed" delayed so long to assert his right that any trees or shrubs on it had had time to strike roots in the new soil, what was regarded as a reasonable time for the assertion of his rights was considered to have elapsed, and the avulsed land, together with any trees or shrubs adhering, acceded to the land on which it had been deposited.[3]

(*e*) ADJUNCTION as a manifestation of the general principle of accession signified the addition of one thing to another, so as either to form a new thing, or to alter the character of each. Examples of adjunction were embroidery on, or woven into a garment,[4] writing on a paper (*scriptura*),[5] painting upon a tablet (*pictura*),[6] *inaedificatio*,[7] *plantatio*,[8] and *satio*.[9]

Embroidery, or dye worked upon or woven into a garment, was regarded by the Roman Law as acceding to the garment, even although it might be much more valuable than the property to which it acceded, if it had been so worked upon or woven into the garment as to be inseparable from it, and the former owner of the accessory thing would, in such a case, have only a personal action against the owner of the garment for the value of his property.[10] Similarly, writing on a paper was regarded as acceding to the owner of the paper, subject to a liability to pay the value of the writing; on the other hand, however, and contrary to this rule, a painting was not regarded as acceding to

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[1] *Cf.* Sandars, *Institutes of Justinian*, 100.
[2] *Inst.* ii. 1, 22.
[3] *Cf.* Justinian, *Inst.* ii. 1, 21; Gaius, *Inst.* ii. 71; *Dig.* xli. 1, 7, 2.
[4] Justinian, *Inst.* ii. 1, 26.
[5] Justinian, *Inst.* ii. 1, 33; Gaius, *Inst.* ii. 77; *Dig.* xli., 1, 9, 1.
[6] Justinian, *Inst.* ii. 1, 34; Gaius, *Inst.* ii. 78.
[7] Justinian, *Inst.* ii. 1, 29, 30; *Dig.* xli. 1, 7, 10.
[8] Justinian, *Inst.* ii. 1, 31; Gaius, *Inst.* ii. 74; *Dig.* xli. 1, 7, 13.
[9] Justinian, *Inst.* ii. 1, 32; Gaius, *Inst.* ii. 75; *Dig.* xli. 1, 9 pr.
[10] Cf. *Dig.* vi. 1, 23, 5.

the tablet or canvas on which it was painted, but, by reason of the special genius or skill involved in its production, the canvas was considered to be accessory to the painting, but the painter was liable to pay the value of the tablet to its former owner.[1]

> There is, in principle, no difference between the case of writing on paper and a painting on a canvas or tablet. Indeed both Paul[2] and Gaius perceive that, and the latter, while enunciating as settled law in his time the view afterwards adopted by Justinian,[3] admits that he saw no sufficient reason for the distinction.[4]
>
> The explanation of the distinction drawn between writing upon a paper and a picture painted upon a tablet or canvas may probably be found in the fact that the Roman Law did not apparently consider writing upon a paper as literary property produced by the exercise of special skill and genius, but merely as so many signs appended to the paper.[5] The law of literary property and copyright is a modern development of the law of ownership.

Inaedificatio.—This occurred when a man either built upon his own ground with materials belonging to some other person or built upon the ground of another person with his own materials.[6] In both of these cases the building acceded to the owner of the land on which it was built, upon the principle *solo cedit quod solo inaedificatur.*

If a man built on his own ground with materials belonging to another, in good faith, he could not be compelled to make them good to their owner[7] by pulling down or destroying the building in whole or in part, but the owner of the materials might, if he preferred, recover[8] double their value from the owner of the land; if, however, he did not do so he could bring a real action for the materials if and when, from any cause, the building was destroyed.

If an owner built on his own land, however, in bad faith (*in mala fide*) with materials belonging to, and which he knew to belong to another person, he was punished for his bad faith by being liable to both an action for double the value of the materials and an action for their production,[9] and as he could not produce them so long as the

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[1] The owner of the tablet could compel the painter to pay the value of the board rather than deliver up the tablet by a fictitious assertion of ownership allowed him by the Praetor in an *actio utilis* (*cf.* Sandars, *Institutes of Justinian*, 109).

[2] *Dig.* vi. 1, 23, 3.

[3] *Inst.* ii. 1, 34; *Dig.* xli. 1, 9, 2.

[4] Gaius, *Inst.* ii. 78.

[5] *Cf.* Mackenzie, *Roman Law*, 7th ed., 178.

[6] Justinian, *Inst.* ii. i. 29, 30; *Dig.* xlvi. 1, 7, 10; xli. 1, 7, 12; Gaius, *Inst.* ii. 73, 76.

[7] By means of an action *ad exhibendum.*

[8] By means of the action *de tigno juncto.*

[9] *Dig.* vi. 1, 23, 6.

building stood he was condemned to pay compensation for having deliberately rendered himself unable to do so.[1] The owner at the same time continued to retain his right to reclaim the materials on the destruction of the building.[2]

On the other hand, if a man built in good faith, and unknowingly, on the ground of another person, although the building therefore acceded to the land upon which it was built and to the person who owned it, yet the builder, if in possession, could not be dispossessed by the owner of the land and building upon it unless he was compensated by the latter for the added value of the property.[3] If the owner of the materials acted in bad faith and built in the knowledge that he was not the owner, he had no claim for compensation, but he might remove the materials if that could be done without injury to the other person's property.[4] When the owner of the materials was not in possession of the building he was entitled to reclaim the materials when the building was destroyed, irrespective of whether he had acted in good or in bad faith, but he had no claim for compensation.

Plantatio.—This term signified either the planting of another person's tree or suchlike in one's own ground, or the planting of one's own tree in another person's ground, by which the tree or plant acceded to the ground and to the owner of it as soon as it had taken root in the soil.[5] If, however, the tree took root partly in the soil of one owner and partly in that of another, it was considered as belonging partly to the one and partly to the other.[6]

If the person who planted the tree was in possession of the land in good faith the owner of the land would have to compensate him, for otherwise his claim to possession could be defeated by the defence of bad faith (*exceptio doli mali*) on the part of the *bonâ-fide* possessor of the land. *Satio* was the planting of grains of wheat or corn in circumstances similar to those of the planting of trees or plants, and exactly the same rules applied in the case of *satio* as in that of *plantatio*.[7]

In the cases of *plantatio* and *satio* the tree or the corn continued to belong to the owner of the land after separation from it, on the principle that the tree, or plant, or corn was by that time something different from what it had formerly been, by reason of the nourishment it had

[1] *Dig.* xlvii. 3, 1, 2.

[2] *Dig.* xlvii. 3, 2.

[3] Justinian, *Inst.* ii. 1, 30. See Sandars, *Institutes of Justinian*, 106, for commentary upon this section.

[4] *Dig.* vi. 1, 37.

[5] Justinian, *Inst.* ii. 1, 31 ; Gaius, *Inst.* ii. 74, 76 ; *Dig.* xli. 1, 7, 13.

[6] *Cf.* Sandars, *Institutes of Justinian*, 108.

[7] See Justinian, *Inst.* ii. 1, 32 ; Gaius, *Inst.* ii. 75, 76 ; *Dig.* xli. 1, 9 pr.

drawn from the soil;[1] in this respect trees, plants, cereals, and such like were differentiated from building materials, which could be reclaimed.[2]

(*f*) CONFUSION (*Confusio*) and COMMIXTURE (*Commixtio*).—These terms signified the mixing together, or the combination of things belonging to different owners without thereby forming a new species or article.[3]

The term "confusion" (*confusio*) was ordinarily used to mean the mingling together of liquids belonging to different owners, while the term "commixture" (*commixtio*) usually signified the mixture together of solids.

A combination might be either separable or inseparable; if inseparable there was confusion, and if separable there was commixture.

If things or materials belonging to different owners were mixed together without the consent of one or the other owner, then so long as the things were of such a nature as to render them easily distinguishable and separable—such as, for example, sheep, or cattle—the ownership of each remained separate and distinct, and each owner could sue for his property by a *rei vindicatio* or real action; but if the things mixed were either thereafter incapable of being distinguished or separated, such as the contents of different casks of wine, or could only be separated and distinguished with great difficulty and labour, such as separate grains of corn, the whole combination was considered as becoming the common property of the respective owners, and the rights of each owner in the whole were determined by the different qualities as well as quantities of the materials before they were mixed.[4]

If, on the other hand, materials belonging to different owners were mixed with the owners' consent, the whole combination thereby became their common property; and it was immaterial, in such circumstances, whether the combination so formed was separable or inseparable. In such a case there was no room for the operation of the principle of accession, which only came into effect when the combination took place without the consent of one or other of the owners.[5]

(*g*) SPECIFICATION (*Specificatio*).—This was the name applied by the Roman Law to the acquisition of ownership by the formation, at the hands of one person, of a new subject or species (*nova species*)

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[1] *Dig.* xli. 1, 26, 1, 2.

[2] *Cf.* Moyle, *Inst.* 205, 206; Sandars, *Institutes of Justinian*, 107, 108.

[3] See Justinian, *Inst.* ii. 1, 27, 28.

[4] Justinian, *Inst.* ii. 1, 28; *Dig.* vi. 1, 4, 5.

[5] *Cf.* on commixture and confusion, Hunter, *Roman Law*, 281; Mackenzie, *Roman Law*, 178; Sandars, *Inst.* 103-105. *Cf.* also French Civil Code, Arts. 565-569.

from materials belonging to another person, such as, for example, flour from corn, oil from olives, wine from grapes, a coat from wool, or a ship, a chest, or a seat from another man's timber.[1] Specification is sometimes treated as a form of accession, and at other times is considered as itself constituting a separate mode of acquisition of property; the former view is probably the more correct one, although it is difficult in certain respects to fully reconcile specification with the principle of accession.[2] There was a controversy between the Proculians and the Sabinians as to which was the principal and which was the accessory thing in those cases where the materials of one man had been given a new character through the labours of another. The Proculians held that the person who had made the new thing became thereby also the owner of the materials, while the Sabinians maintained that the change could not have been effected without the precedent existence of the materials, and that consequently the new thing acceded to the owner of the materials as the principal thing. Justinian settled the controversy by taking a middle course: he established, as a criterion for the determination as to whether or not specification had take place, the rule that if the new species that had been made out of the original materials could be again reduced to the material of which it was originally composed—such as gold or silver plate into bullion—the original materials were to be regarded as still existing to the effect of enabling the owner to claim them even in that altered state, subject, however, to a liability to compensate the workman for the value of his labour; but if, on the other hand, the original materials had been so wholly changed in character as to constitute, in fact, a "new species" (*nova species*) that would fall within a different category of merchandise, and which could not be reduced or restored to its former state, such as wine from grapes, or flour from corn, or oil from olives, and such like, the new species was to be regarded as the principal thing, and the original material acceded to the person whose labour had effected the change, subject, however, to a liability to compensate the former owner for the value of his materials.

The middle course here adopted by Justinian and the distinction drawn by him reconciled the two conflicting views. In the latter case, however, in which effect was given to the Proculian view, the maker of the "new species" seems to have been regarded as becoming the owner of the materials rather by a form of occupation than by one of accession, on the ground that if the new species was actually not the

[1] Justinian, *Inst.* ii. i. 25; Gaius, *Inst.* ii. 79; *Dig.* xli. 1, 7, 7; 1, 27, 1; vi. 1, 5, 1.

[2] *Cf.* Poste, *Institutes of Gaius*, 167.

same thing as the materials then it was a *res nullius*.[1] But the acquisition of the new species on the part of the person who had done the work would seem, more correctly, to be truly by a form of accession, for it is impossible to overlook the Sabinian contention that but for the precedent existence of the materials the "new species" could not come into existence. The fact is, as remarked by Poste, that "specification is a title which cannot without violence be brought under either *occupatio* or *accessio*."[2] The labour expended upon the materials undoubtedly invests them with a higher economic value, and it is in virtue of this fact that the workman who creates a new product may be regarded as acquiring thereby a right to claim the product as his own.[3]

If a thing that was not a "new species" was made by a person who owned part of the materials, he would not be entitled, in virtue of the mere combination of his labour and his ownership of part of the materials, to claim the thing if the materials owned by him were not principal, but were merely accessory to some of the other materials.[4] Moreover, if after the work done upon the materials these were still separable from each other the rights of the respective owners of each still subsisted.

In order to properly constitute "specification" it was essential that the change in the materials upon which the work had been expended should have amounted to a real or actual alteration of the character of the subject; so that, for example, the mere threshing of corn, or dyeing of cloth would not suffice to operate specification and transfer the ownership of the materials.[5]

SECTION 74.—FRUCTUUM PERCEPTIO

Besides "occupation" and "accession," the taking or gathering (*perceptio*) the produce or "fruits" (*fructus*) of things was a natural mode of acquisition. The "fruits" (*fructus*) or produce of property are such things as the milk of a cow, the offspring, or the hair, or the wool of animals, minerals,[6] the fruits in gardens, or the crops of fields; also "civil" or "industrial" fruits, such as the rents of houses[7] or the interest upon money.[8] In the ordinary case the owner of property,

[1] Cf. *Dig.* xli. 1, 7, 7, *quia quod factum est ante nullius fuerat.*

[2] Poste, *Institutes of Gaius*, 4th ed., 167.

[3] *Cf.* Sohm, *Inst.*, 3rd ed., 324.

[4] *Cf.* Justinian, *Inst.* ii. 1, 25.

[5] See with regard to accession a special and instructive note upon the union of things and the principle regulating ownership in such cases in Sohm, *Inst.*, 3rd ed., 325-327.

[6] *Cf.* Justinian, *Inst.* ii. 1, 37; *Dig.* l. 16, 77.

[7] *Dig.* xxii. 1, 36.

[8] This did not apply to usury, however, because it was not considered as arising from the money lent itself, but merely as the result of special agreement, and so

such as land or animals, acquires by accession the fruits by reason of his ownership or *dominium*.

But a person other than the owner of the property may have right to the enjoyment of its produce, and by the gathering (*perceptio*) of it become thereby its owner: the principal examples of such in the Roman Law were a lessee of a farm (*colonus*), a usufructuary,[1] and a *bonâ fide* possessor.

The fruits of the subject did not become the property of either the usufructuary or the *bonâ fide* possessor until they had been actually gathered, and up to that time they belonged to the owner of the property that produced them.[2]

A *bonâ fide* possessor was a person in possession of property that he had received in such a way as he honestly believed gave him a good legal title to it. In other words, he had obtained the property in good faith, believing the person from whom he received it to be the owner, and competent to transfer the ownership; while the mode by which he obtained the property was *ex justa causâ*, or one recognised by the law as competent to transfer ownership.

The right of a *bonâ fide* possessor in the fruits, which included not merely those produced by his care and cultivation, but all the fruits of the property whatsoever these might be,[3] was complete, as against all the world except the owner of the property, from the moment he had gathered them, irrespective of whether he had or had not yet consumed them. The owner, on the other hand, could claim from the *bonâ fide* possessor the fruits so far as they had not yet been consumed, for they were regarded by the law as the property of the possessor merely *interim*, or "in the meantime," until such time as the owner should claim them;[4] but he had no claim for the fruits or the value of the fruits that had already been consumed in good faith.[5] The *mala fide* possessor, or the possessor "in bad faith," on the other hand, was liable to make good to the owner not only the unconsumed fruits, but also the value of all the fruits that he had consumed since the commencement of his *mala fide* possession.[6]

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could not be regarded as truly *fructus* or "fruits" (*Dig.* l. 16, 121). See, as to the nature of "fruits" (*fructus*) generally, Girard, *Manuel de Droit Romain*, 5th ed., 249.

[1] See "Usufruct," *post*, under "Personal Servitudes."

[2] *Cf.* Justinian, *Inst.* ii. 1, 36.

[3] *Dig.* xli. 1, 48; but cf. *Dig.* xxii. 1, 45, for the apparent opinion of Pomponius to the contrary.

[4] *Dig.* xli. 1, 48.

[5] Justinian, *Inst.* ii. 1, 35; *Dig.* xli. 1, 48; xxii. 1, 45.

[6] Justinian, *Inst.*, *ut supra*; *Dig.*, *ut supra*. See, on *fructuum perceptio*, Moyle, *Inst.*, 4th ed., 207; Sohm, *Inst.*, 3rd ed., 325; Roby, *Roman Private Law*, i. 418; Sandars, *Institutes of Justinian*, 110; Girard, *Manuel de Droit Romain*, 3rd ed., 321-325.

SECTION 75.—DERIVATIVE ACQUISITION [1]

Acquisition of property is said to be derivative in those cases where the right of ownership is derived from that of another person who transfers his right of ownership with the intention of making the transferee the lawful owner or possessor of the subject instead of himself. Derivative acquisition presupposes and depends upon a right of ownership already existing in some person at the moment of acquisition of the property. Derivative acquisition may be effected by means of either (*a*) voluntary or (*b*) involuntary transfer.

A "voluntary" transfer is one known otherwise as "conventional," because it is the outcome of a "convention" (*conventio*) or agreement between parties; whereas an "involuntary" transfer is one that operates independently of the wishes of the owner at the time of transfer, as, for example, by a judicial decree, or by a legal forfeiture.

Amongst derivative modes of acquisition recognised by the Roman Law were contract, gift, exchange, or such other legal title in respect of which the transferee acquired at least the "juristic," if not the actual, possession of the property by means of either actual or constructive "tradition" [2] (*traditio*) or delivery.

SECTION 76.—SINGULAR AND UNIVERSAL SUCCESSION

Property might be acquired, according to the Roman Law, either (*a*) singly or (*b*) as a universality or entirety (*universitas rerum*).

A *universitas rerum*, or "an entirety of things," was the aggregate of all the rights possessed by a particular person.

"Single things" (*res singulares*) could be acquired either "civilly" or "naturally" by *mancipatio*,[3] *in jure cessio*,[4] *usucapio*,[5] *occupatio*,[6] *accessio*,[7] *fructuum perceptio*,[8] *praescriptio* [9] and *traditio*,[10] and *donatio*,[11] and the person so acquiring is known as a "singular successor" to such property in that he succeeds to the right of the previous owner of the single or particular object.[12]

Things could be acquired collectively, or as a universality or aggregate of all the rights of a particular person by testamentary succession, intestate succession, *bonorum venditio* or enforced sale of a debtor's

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[1] See also *ante*, p. 216.
[2] See *post*, Chapter IV., p. 231.
[3] See *ante*, p. 214.
[4] See *ante*, p. 215.
[5] See *post*, p. 234.
[6] See *ante*, p. 217.
[7] See *ante*, p. 220.
[8] See *ante*, p. 227.
[9] See *post*, p. 234 *et seq.*
[10] See *post*, p. 231.
[11] See *post*, Chapter VI., p. 242.
[12] See *ante*, p. 202.

property, arrogation, forfeiture,[1] and *addictio bonorum libertatis causâ*.[2] A person so acquiring a *universitas* is known as a "universal successor."

[1] Under the *S.-C. Claudianum*.

[2] This was a means, introduced by the Emperor Marcus Aurelius, whereby, failing heirs to enter upon an insolvent inheritance, a person was assigned the succession in order to prevent bequests of freedom becoming void by reason of the non-entry of an heir.

CHAPTER IV

Tradition (Traditio) or Delivery of Property

It was not sufficient, according to the Roman Law, in order to transfer property both that the transferror should be the legal owner,[1] and the transferror and transferee should consent or agree to the transfer, but there further required to be "tradition" or delivery of possession,[2] along with an intention to transfer the control and ownership of the property. The possession so delivered, however, did not require to be necessarily actual possession or physical detention, without which it was quite possible for ownership to pass, for *traditio* did not necessitate corporeal delivery. The possession that the Roman Law desiderated was "juristic" or legal possession, or control effected by a change of intention (*animus*), but which did not necessarily involve corporeal and visible transfer. "Tradition" (*traditio*), which signifies literally a "delivery" or "handing-over," was thus in Roman Law the placing of another person in legal possession of the property as owner of it by and in place of the existing owner, through a change of intention with regard to the ownership; a mere delivery (*nuda traditio*) of property as for safe custody under the contract of deposit, or in loan, or a mere agreement to deliver unaccompanied by the change of intention with regard to the ownership, did not constitute "tradition" in the strict sense, or transfer ownership.[3] The intention accompanying the delivery which gave the act the character of a *traditio* required to be expressed in what was known as a *justa causa traditionis*, or "legal reason of delivery,"[4] or, in other words, by some juristic act, such as a contract of sale (*venditio*), an exchange (*permutatio*), a promise to make a gift (*donatio*),[5] a dowry (*dos*), loan for consumption (*mutuum*),[6] or payment (*solutio*).

"Tradition," or delivery of the property following upon the agreement to transfer, might be either (*a*) actual or (*b*) constructive; and in

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[1] *Dig.* xli. 1, 20 pr.

[2] Justinian, *Inst.* ii. 1, 40, 41.

[3] *Code*, ii. 3, 20.

[4] "*I.e.* the intention on the one hand to give, on the other to receive ownership" (Moyle, *Inst.* 210).

[5] Cf. *Dig.* xli. 1, 31 pr.

[6] See *post*, under "Real Contracts."

order that the tradition or transference of the ownership of the property should be effective it was requisite that the lawful owner should consent to transfer the property (*res*) either personally or by his agent, upon some good legal title—such as sale, gift, or exchange—with the intention, at the same time, that his property should thereby become the property of the transferee, who, on his part, must have the intention of thereby becoming, and exercising the legal control as owner of the thing.

SECTION 77.—CONSTRUCTIVE DELIVERY

This is imaginary as opposed to actual delivery. Constructive delivery is operated when the thing itself is not actually handed over but merely some sign or symbol of juristic possession and ownership is given—such as the key of a house,[1] or the title-deeds of property—by means of which the transferee can make his possession complete and effective.[2]

When there did not take place actual physical handing over, but the property was nevertheless placed in the view of the transferee with the intention that he should take possession of it, there was said to be *traditio longa manu* ("delivery by the extended hand"), in contrast to a form of constructive delivery known in the Roman Law as *traditio brevi manu* ("with the short hand"). Tradition *brevi manu* took place in those cases where it happened that the property to be transferred was already in the possession of the person to whom it was to be transferred, in virtue of some preceding agreement entitling the transferee to the possession of the property upon a title other and lower than ownership, such as hire, or loan. When a person already having the detention of property on such a title purchases it the transfer of the ownership and the conversion of the previous title into one of ownership is effected by the change of intention (*animus*) of both parties with regard to the thing, the former owner thereupon intending that the possessor should thereafter continue to possess the property upon a new title as owner, and no longer as a mere possessor under the preceding agreement, and the possessor must continue to possess with a corresponding change of intention.[3]

In the case of *brevi manu* tradition the transfer of ownership, or of juristic possession, was effected without any change of detention; and this also happened when a person who has alienated property to another continues to retain it in his control, and detention for the transferee

[1] *Cf.* Justinian, *Inst.* ii. 1, 45; *Dig.* xli. 1, 9, 6.
[2] *Cf.* Moyle, *Inst.* 211, 212.
[3] *Cf.* Justinian, *Inst.* ii. 1, 44; *Dig.* xli. 1, 9, 5.

upon a lower title, such as hire, or loan, or usufruct, or mandate, or deposit; this case was known in the Roman Law as *constitutum possessorium.*

Traditio, or delivery, as a means of transferring ownership by a mere change of intention and without any necessary formalities, pertained to the *jus gentium,* and as such was a "natural" mode of acquisition. The delivery of the old *jus civile* was accompanied and effected by the formal procedure of *mancipatio* or of *in jure cessio,* which constituted "civil" acquisition; but as has been already observed,[1] the distinction between "natural" or "civil" modes of acquisition, although still existing, had lost its significance in the law of Justinian, and the distinction in the modes of acquisition had by that time come to be between those that were respectively "original" and "derivative."[2]

The rule of the Roman Law requiring *traditio* or technical delivery in order to transfer the ownership of property has not been followed in some modern systems. Thus the law of both Scotland and England recognises as a general principle that, except in particular cases,[3] the transference of specific property is operated as soon as the contract or agreement to transfer is completed.[4] The law of France also recognises the general principle that property may be transferred by mere agreement without the necessity of actual delivery.[5]

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[1] *Ante,* p. 216.

[2] See upon the Roman *traditio,* Moyle, *Institutes of Justinian,* 4th ed., 209-212; Hunter, *Roman Law,* 4th ed., 282-286; Buckland, *Principles of Roman Private Law,* 86-88; Mackenzie, *Roman Law,* 7th ed., 178; Sandars, *Institutes of Justinian,* 8th ed., 112, 113; Sohm, *Institutes of Justinian,* 3rd ed., 312-314; Girard, *Manuel de Droit Romain,* 5th ed., 293-298; Cuq, *Institutions Juridiques des Romains,* i. 266 *et seq.*

[3] *E.g.* the transfer of shares.

[4] The Scots and English law in this respect have been assimilated by the "Sale of Goods Act," 1893, ss. 17, 18.

[5] French Civil Code, Art. 1138; *cf.* also Arts. 711 and 1583, and Egyptian Civil Code, Art. 267.

CHAPTER V

Prescription (Praescriptio)[1]

Rights to property might be both acquired and lost by "prescription," which may be briefly and generally defined as either the acquisition or the loss of rights in property by mere lapse of time. Prescription as a positive mode of acquisition of property signified the acquisition of rights in property by reason of the continuous possession of it throughout a certain period fixed by law.

The principle upon which mere lapse of time is permitted by the law to constitute a valid title to property is both in order to ensure security of enjoyment of property to which the title is defective by imposing a limit of time for the assertion of rights of ownership, and also to facilitate proof of ownership.

The time (*tempus*) fixed by law, the lapse of which constitutes a title to property, is known as "the prescriptive period."

The earliest recognition in the Roman Law of the principle of acquisition of property by possession for a certain length of time is to be found in the Twelve Tables under the name of "usucapion" (*usucapio*), which was a means intended to validate informal and defective conveyances of property which would not otherwise have been valid transfers according to the old strict *jus civile*. "Usucapion" was thus the early form in the Roman Law of the acquisition of right to property by lapse of time, in respect of which a prescriptive title to property was acquired by possession of movables for one year and of immovables for two years;[2] it was, however, very limited in its application, being competent only in the case of certain kinds of property,[3] and available only to Roman citizens and those persons who, not being citizens,

[1] See on prescription generally Justinian, *Inst.* ii. 6; *Dig.* xli. 3; *Code*, vii. 30-39. *Cf.* Gaius, *Inst.* ii. 42-51; Hunter, *Roman Law*, 4th ed., 288, 289, 645-649; Sandars, *Institutes of Justinian*, 136-147; Moyle, *Institutes of Justinian*, 4th ed., 225-231; Mackenzie, *Roman Law*, 194 *et seq.*; Roby, *Roman Private Law*, i. 467-483; Buckland, *Roman Private Law*, 88-92; Muirhead, *History of Roman Law*, 2nd ed., 392; Sohm, *Institutes of Roman Law*, 3rd ed., 319-322; Cuq, *Institutiones Juridiques des Romains*, ii. 243-251; Girard, *Manuel de Droit Romain*, 5th ed., 299-313.

[2] Justinian, *Inst.* ii. 6 pr.

[3] See Mackenzie, *Roman Law*, 19, note 2.

enjoyed the right of *commercium* (*jus commercii*) and were thereby capable of acquiring "quiritary" ownership.[1]

The Praetorian law came to recognise and protect the possessory titles of those persons who, not being Roman citizens, could not acquire a quiritarian title to property through usucapion, by means of the creation, under the name of *praescriptio*, or *possessio longi temporis*,[2] of an equitable defence to an action, available to a possessor against anyone claiming the property, based upon the fact of the possession of the property throughout a certain length of time. Prescription (*praescriptio*), thus originally introduced into the later Roman Law merely as an equitable defence, came in time to be regarded as itself a mode of curing defects of title and of acquiring property by lapse of time, and of giving a title to property that could not be the subject of "quiritary" ownership;[3] so that after the lapse of the prescriptive period the possessor, if he lost possession of the property, could recover it by "vindication" as an owner.[4]

> Prescription (*praescriptio*) thus came to have, under the later law, the twofold effect of either positively giving a complete title to property in respect of continuous possession of it for a certain period, or, negatively, extinguishing rights to property by reason of the failure of the owner to assert his right within the limit of time fixed by the law. Prescription, however, notwithstanding its negative aspect in respect of the default of the owner, was truly a positive mode of acquisition based essentially upon the claims of the possessor.[5]

By the time of Justinian the technical distinction between "usucapion" (*usucapio*) and "prescription" (*praescriptio*, or *possessio longi temporis*) disappeared,[6] and they became merged together under the general name of "prescription" (*praescriptio*); and, moreover, by that time prescription conferred upon the possessor the true ownership (*dominium*) of the property.[7]

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[1] See *ante*, p. 209 *et seq.*, on "quiritary" or "quiritarian" ownership.

[2] Literally, "possession of a long time."

[3] *E.g.* "provincial lands."

[4] See, as to the points of difference between *usucapio* and *praescriptio*, Mackenzie, *Roman Law*, 194, note 3.

[5] *Cf.* Hunter, *Roman Law*, 288; Mackenzie, *Roman Law*, 195.

[6] This was mainly by reason of the disappearance of the distinction between Italian and provincial land, and that between "quiritary" and "possessory" ownership (see *ante*, p. 210).

[7] The term *usucapio* was, nevertheless, sometimes thereafter used to signify the later prescriptive acquisition of movables in three years, and is so used in *Institutes*, ii. 6 pr., and so also in ii. 6, 12, with respect to *accessio possessionis* (see *post*, p. 239).

SECTION 78.—REQUISITES FOR A VALID PRESCRIPTIVE TITLE

In the time and by the law of Justinian it was requisite, in order to create a valid prescriptive title to property by lapse of time, that movables should have been possessed for three years, and immovables for a period of ten years, if the parties lived in the same province, or for a period of twenty years if they lived in different provinces,[1] irrespective of the locality in which the property itself was situated.[2] The possession, moreover, upon which a valid prescriptive title might be acquired required to be (*a*) in good faith (*in bonâ fide*), (*b*) upon a good title (*ex justa causâ*), and (*c*) uninterrupted.

(a) *Possession "in Good Faith" (in bonâ fide)*

This requirement signified that the possessor must have acquired possession of the property honestly believing that the person from whom he obtained the property had himself a good legal title to it as owner which he could competently transfer; if the transferror or a predecessor had acquired the property illegally the title was thereby rendered "vitious," the illegality constituting what was known as a *vitium* or defect in the title. It was immaterial, however, and the course of the prescription was not affected if the possessor, subsequent to his entering, and provided that he had entered upon his possession in good faith, discovered the defect in his title,[3] unless in the case where the possessor was profiting by the period during which the person from whom he had acquired the property had already prescriptively possessed it; in such a case supervening bad faith had a different effect, according as it was on the part of an heir or of a singular successor.[4]

(b) *Possession "on a Good Title" (ex justa causâ)*

This requirement signified that the possessor must have become possessed of the property in such a way as would have legally made him, in ordinary circumstances, the owner of the property—for example, sale, gift, payment, exchange, bequest—but for (*a*) a defect in the title

[1] The allowance of time was in order to give the owner a reasonable period within which to assert his rights, having in view the difficulties of communication between one part of the Empire and another. *Cf.* Hunter, 289.

[2] Parties were said to be "present" if they were both domiciled in the same province, and "absent" if they had their domicile in different provinces (*Code*, vii. 33, 12). When parties had lived in the same province during part of the time, two years of "absence" was held as equivalent to one year's "presence" (*Nov.* 119, 8).

[3] The belief, however, required to be one of fact and not of law, and, moreover, in such circumstances as would render it reasonable and excusable.

[4] See *accessio temporis, post*, Section 81, p. 238.

of the person transferring the property, or (*b*) on account of defective legal capacity on the part of the transferror, or (*c*) by reason of the thing transferred having been placed by the law "outside commerce" (*extra commercium*), and being, therefore, incapable of being the object of private ownership.

(c) *Possession Uninterrupted*

It was, further, essential for the creation of a valid prescriptive title to property that there should have been continuous and uninterrupted possession throughout the whole period fixed by the law upon an ostensible or *ex facie* title as owner.

If the possession had not been continuous throughout the period required by the law to cure the defect in the title, it was said to have been "interrupted" or broken, which was signified in the Roman Law by the term *usurpatio*.[1]

"Usurpation" (*usurpatio*), or interruption of prescription, might be either (*a*) natural or (*b*) civil; it was effected "naturally" in such ways as by the possessor losing the control or actual physical detention of the property, or when owing to natural physical causes, such as, for example, an inroad of the sea, it became impossible to occupy the property and so to possess it;[2] and interruption was operated "civilly" in such ways as by the real owner vindicating or claiming his property by an action at law (*rei vindicatio*) within the legal period of prescription, or by the performance on the part of the owner of some act or acts significant of his right of ownership and inconsistent with the claims of the possessor.

If the property was an immovable the expulsion of the possessor from it by means of an action at law constituted "civil" interruption.

When interruption was effected by an action at law the interruption of the prescription was reckoned, in the time of Justinian, from the moment when the dispute commenced and not from the time of *litiscontestatio*, or that point in the proceedings when the parties mutually surrendered their claims and submitted them to the arbitrament of the Court.[3]

Interruption or "usurpation" was also effected by capture in war and its consequent civil death; for the *jus postliminii*[4] did not apply to and revive the rights of a mere possessor, because possession was a fact, and as a fact it had been lost; consequently if a former possessor

[1] *Dig.* xli. 3, 2.
[2] *Dig.* xli. 2, 3, 17.
[3] *Code*, vii. 33, 10.
[4] See *ante*, Part II., Section 4, p. 72, "Law of Persons."

recovered his liberty he would require to commence a new period of possession.[1]

SECTION 79.—EFFECT OF INTERRUPTION OF PRESCRIPTION

The effect of interruption was to terminate the course of the prescription so that the person prescribing lost the benefit of the period during which he had already possessed the property, and he had to begin a new period of possession dating from the time of the interruption. If the possessor temporarily lost the detention or actual physical control of the property but subsequently recovered it, he was entitled to commence a new period of prescriptive possession on the same title as that upon which he had previously been possessing the property, provided he was still in good faith.[2]

SECTION 80.—WHEN PRESCRIPTION WAS COMPLETE

Prescription was not complete and did not take effect until the last moment of the legal period had elapsed, and at any moment up to that time interruption might validly take place.[3]

There were certain grounds recognised by the Roman Law as good reasons for the failure on the part of the owner to assert his rights within the prescriptive period; such grounds were minority, absence on state business, captivity, and in such cases the period of prescriptive possession necessary was proportionately extended. Prescription was suspended during the minority of the person entitled to challenge the possessor's claim; this suspension was not, however, an interruption of the prescription, but its effect was that the period of possession necessary to constitute a prescriptive title required to be complete after deducting the period of minority. The operation of prescription was also suspended during the period allowed by the law to heirs in order to deliberate whether or not to take up an inheritance.[4]

SECTION 81.—ACCESSIO TEMPORIS

This expression means literally the "accession" or "addition of time," and it was used in the Roman Law to signify the adding together of two or more periods of possession of the same subject by different possessors in order to make up the full prescriptive period.

"Accession of time" was not competent under the early form of prescriptive acquisition known as "usucapion" (*usucapio*), and this was one of the defects of that mode of acquisition, besides its limited

[1] *Dig.* xlix. 15, 12, 2; Sandars, *Institutes of Justinian*, 146.
[2] *Dig.* xli. 3, 15, 2; xli. 4, 7, 4.
[3] *Cf.* French Civil Code, Arts. 2260, 2261.
[4] *Code*, vi. 30, 22, 11.

application and competence, which led to the extension of the principle of prescription through the equitable jurisdiction of the Praetors.

Accessio temporis, which was also known as *accessio possessionis*, was originally competent only to an heir, but it was ultimately extended to transfers of property *inter vivos*, and to "singular successors" and persons acquiring property on a title other than that of "universal succession."[1] There was, however, an important difference in effect according as bad faith (*mala fides*) supervened to an heir or to an ordinary transferee *inter vivos*. In the case of an heir supervening bad faith did not affect his prescriptive possession, but bad faith supervening on the part of an ordinary *inter vivos* transferee deprived him of all benefit which would otherwise have accrued to him from the good faith of his predecessor.

The principle underlying this rule was that an heir was regarded by the law as the same person as him to whom he succeeded,[2] so that bad faith on the part of the heir was merely equivalent to bad faith supervening upon the deceased's original *bonâ fide* possession and therefore did not affect the course of the prescriptive possession.[2] The ordinary *inter vivos* transferee, on the other hand, who acquired particular or "single" things in any way other than as part of a universal succession was considered by the law as a person entirely separate and distinct from the person who transferred his rights to him.

SECTION 82.—PRESCRIPTION LONGISSIMI TEMPORIS

This prescription "of a very long time" (*longissimi temporis*) was a specially extended period of prescriptive possession which in the time of Justinian gave a good defence against any claim to a person who had been in undisturbed possession of property for thirty years, or in the case of ecclesiastical property, or of hypothecated property in the possession of the debtor, for forty years, irrespective of what illegality (*vitium*) might be attached to its acquisition, whether in the form of bad faith (*mala fides*), theft, violence, absence of *justa causâ*, or the fact that the property was *extra commercium*.[3]

The effect of the "very long" prescription was, in other words, that by the law of Justinian, if an owner had lost possession of his property for a period of thirty years, his right to claim or vindicate it was thereby extinguished without reference to the mode of acquisition,

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[1] *Cf.* Justinian, *Institutes*, ii. 6, 13; *Dig.* xli. 4, 2, 20. On "singular" and "universal" succession, see *ante*, Section 76, p. 229, also p. 202.

[2] See on supervening bad faith, *ante*, Section 78 (*a*), p. 236.

[3] *Code*, vii. 39; *Nov.* 117.

whether good or bad, of the possessor, whilst the lapse of the specially long period of prescription removed any "vitiosity" or illegality there might be in the title to the property.

SECTION 83.—PRESCRIPTION OF OBLIGATIONS AND ACTIONABLE RIGHTS

The effect of prescription as a means of extinguishing obligations and actionable rights only commenced at that point of time when the obligation could be judicially enforced by an action at law;[1] consequently if a debt was not due until a fixed future date, prescription did not begin to operate until that date had arrived; and, similarly, if the existence of an obligation was dependent upon a condition,[2] prescription did not commence to run until the condition had been fulfilled, for until then it cannot be known whether or not there is any obligation to prescribe. So also prescription only began to run upon a warranty against eviction after that had taken place.[3]

Justinian fixed the period of extinctive prescription of actions-at-law in general at thirty years; the *actio hypothecaria*, however, was given a special prescription of forty years,[4] and ecclesiastical actions were also allowed a period of extinctive prescription of not less than forty years. A few actions proscribed in shorter periods varying from a few months to five years.

The prescription of obligations generally, and of rights of action created in respect of them, was first enacted by the Emperor Theodosius II. in 424 A.D., and a period of thirty years was then fixed for the extinction of all "perpetual"[5] actions, whether "real" (*in rem*) or "personal" (*in personam*).[6]

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[1] *Code*, vii. 1, 1; v. 12, 30.

[2] See upon "Conditional Obligations," *post*, Part IV.

[3] *Code*, vii. 39, 8, 4.

[4] *Code*, vii. 39, 7, 1.

[5] In the time of Justinian the term "perpetual" action (*actio perpetua*) signified merely an action that could competently be brought at any time within thirty or forty years, as the case might be, as distinguished from those that prescribed in a shorter time. According to the older law the right of action was perpetual, with some exceptions, as in the case of the *querela inofficiosi testamenti*, and actions regarding the *status* of a deceased person, both of which prescribed in five years. Until the Emperor Constantine enacted that a claim of ownership should be barred by the lapse of forty years (reduced subsequently by Theodosius to thirty years), and that such lapse should create an *exceptio* or defence in all "real" actions, there had continued to subsist an old distinction between *actiones perpetuae* and *actiones temporales*. The former were most of the actions based on the *jus civile*, while the latter comprised most of the "praetorian" actions (*actiones honorariae*), and these for the most part prescribed within a year or *annus utilis*, made up of days upon which a plaintiff could competently appear and plead, and might in that way be actually more than a year.

[6] *Code*, vii. 39, 3; *Code Th.* iv. 14, 1. *Cf.* French Civil Code, Art. 2262.

The modern French Code contains some rules of prescription closely resembling those of the Roman Law. A person who acquires an immovable in good faith upon an ostensible title, obtains a prescriptive title to the property in ten years, if the district of the Court of Appeal in which the owner lives is the same district as that in which the land lies, and in twenty years if the true owner lives outside such district,[1] and supervening bad faith is immaterial so long as good faith existed at the time the property was acquired.[2] All rights of action, whether "real" (*in rem*) or "personal" (*in personam*), are extinguished by prescription after thirty years, and a person claiming a prescriptive title by reason of the lapse of that time, neither requires to produce any title, nor does a plea of bad faith avail against him.[3] Moreover, the French Code, like the Roman system, provides shorter periods of prescription for particular rights of action varying according to their special nature from six months to five years.[4]

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[1] French Civil Code, Art. 2265.
[2] French Civil Code, Art. 2269.
[3] French Civil Code, Art. 2262.
[4] French Civil Code, Arts. 2271, 2272, 2273, 2276, 2277.

CHAPTER VI

Donation (Donatio)[1]

Donation, or "gift," in its general signification, is the giving of something by one person to another person, from a motive of generosity alone, without there being upon the giver any antecedent legal obligation to do so,[2] and the acceptance of the thing by the other person. Justinian in his *Institutes* treats donation as a mode of civil acquisition; this, however, is incorrect, for donation by itself did not create acquisition or transfer ownership, but only in combination with tradition, for which latter the donation constituted a good antecedent *justa causâ* or legal ground.

The essential characteristic of donation is the motive of generosity, which was styled in the Roman Law *animus donandi*, and signified the voluntary intention to benefit another person gratuitously at the expense of one's self.[3]

The subject of donation did not necessarily require to be a thing the delivery or "tradition" of which would confer *dominium* or ownership, but it might consist of some benefit other than corporeal property. The subject of a donation might be both movable or immovable, and corporeal or incorporeal; thus donation, as well as conferring ownership, might consist of a mere transfer of possession, or in the constitution of a right in the property of someone else (*jus in re aliena*),[4] or in the granting a release from a debt, or in the giving of an obligatory or actionable promise, so long as there was present the essential motive of generosity or *animus donandi*.

The principal characteristic of simple donation, apart from the essential motive, is that it creates only a unilateral or "one-sided" obligation in respect of which only the donor is bound, while a benefit is conferred without a correlative burden being thereby imposed

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[1] Justinian, *Inst.* ii. 7; *Dig.* xxxix. 5, 6; *Code*, viii. 54-57.

[2] Cf. *Dig.* l. 17, 82.

[3] "*Donatio* in the widest sense is any other than a testamentary disposition which (1) is accompanied by consensus between the two parties; (2) voluntarily, gratuitously, and intentionally improves the proprietary position of the donee; and (3) actually or prospectively diminishes the property of the donor" (Moyle, *Inst.* 232).

[4] See on "Rights in the Property of Others" (*jura in re aliena*), *post*, p. 249.

upon the donee; for this reason the acceptance of the donee is very readily assumed by the law without the necessity of a formal expression of it. Three different forms of donation are discussed by Justinian under the respective names of *Donatio propter nuptias*, *Donatio inter vivos*, and *Donatio mortis causâ*; the first has been already explained in connection with the Roman law of marriage.[1]

SECTION 84.—DONATION INTER VIVOS[2]

This (literally a donation or gift "between living persons") was a gratuitous benefit intended to take effect during the life of the donor, and when effected was irrevocable, except, as declared by Justinian, on the technical ground of "ingratitude" in certain special circumstances, such as when the person benefited seriously injured or attempted to injure the person or the property of the donor,[3] or when the donee failed to fulfil the conditions, if any, attached to the gift.

Prior to Justinian's declaration that all donations were revocable on the ground of ingratitude on the part of the donee, the only revocable donations on that ground were those made by parents to their children, and by patrons to their freedmen (*libertini*). Revocation on the ground of ingratitude was, however, personal to the donor and donee, and could not be maintained by the heirs of the donor against the heirs of the donee.

In the time of Justinian a donation *inter vivos* was completed as soon as the donor had indicated in any way, whether by writing or otherwise, his intention to make a gift, and he was thereupon bound, and could be compelled, to make tradition to the donee.[4] The ownership of the subject of the donation did not, however, pass by the mere agreement, but by reason of the tradition which the donor was bound to make in respect of the agreement; so that until delivery the donor continued to be owner of, and alone could vindicate, the property.

Prior to the time of Justinian a mere promise or agreement to make a gift, which was known as a *pactum donationis* or *de donando*, was not enforceable by an action at law on the part of the donee if delivery had not followed upon the agreement, unless the promise had been subsequently put into the form of a "stipulation," in which case the donee would sue on the words of the stipulation, and not on the promise. Justinian made the mere promise, or clear indication of intention to

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[1] See Part II., Chapter VI., Section 46.
[2] *Dig.* xxxix. 5; Justinian, *Inst.* ii. 7.
[3] *Code*, viii. 56, 10.
[4] Justinian, *Inst.* ii. 7, 2.

make a gift (*pactum de donando*) enforceable by an action at law,[1] without the necessity or formality of the promise being embodied in a "stipulation."[2]

It was, however, requisite in the time of Justinian that, with certain exceptions,[3] agreements to make a donation should either be put into writing if exceeding a certain sum (which was originally 300, but was afterwards fixed at 500 *solidi*),[4] and be thereafter registered in a public register, or be made in the presence of five witnesses;[5] a donation, however, that was made without conformity to these rules was not invalid as a whole, but only to the extent of the sum by which it exceeded the maximum fixed by law.[6]

Certain restrictions were imposed by the law upon the freedom of donations *inter vivos*. The "Cincian law" (*Lex Cincia de donis*), which was enacted in B.C. 203, fixed a certain maximum beyond which a donation could not competently be given unless the parties were nearly related by blood; and it prescribed the mode in which donations were to be given, but this statute was obsolete by the time of Justinian. The Emperor Constantine forbade gifts to concubines and illegitimate or "natural" children, but Justinian permitted them, subject to certain restrictions imposed for the benefit of ascendants and illegitimate children.

Governors of Roman provinces were forbidden, towards the end of the Republican period, to accept gifts from persons subject to their authority, lest they might thereby become biassed and their impartiality might be prejudiced.

Gifts between husband and wife (*donationes inter virum et uxorem*) were, with a few minor exceptions, invalid by the law of Justinian if they were of such a character as to be likely to prejudice or impoverish the donor.[7]

Gifts might be competently made, however, before marriage as a settlement upon the wife; such gifts were known as donations *ante-*

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[1] The Emperor Antoninus Pius had previously made such an informal agreement enforceable as between ascendants and descendants (*Code Th.*, viii. 12, 4).

[2] *Code*, viii. 54, 35, 5. The *pactum de donando* in this way became one of the *pacta legitima* or informal agreements specially rendered actionable by Imperial enactment (see Part IV., "Obligations").

[3] Such exceptions were gifts to the Emperor, donations made for the redemption of captives, or for the rebuilding of public buildings that had been burnt, and donations *mortis causâ* (*Code*, viii. 54, 36).

[4] *Code*, viii. 54, 34 pr.; *Code*, viii. 54, 36, 3.

[5] The Emperor Constantine had previously prescribed—what had by that time become usual, but was not imperative—(316 A.D.) that all agreements to make a gift exceeding 200 *solidi* should be put into writing and registered, and tradition of the property be given in the presence of witnesses. In 428 A.D. Theodosius II. had dispensed with registration in certain exceptional cases, and the Emperor Zeno in 478 A.D. dispensed with the necessity of delivery taking place before witnesses.

[6] *Code*, viii. 54, 34, 1.

[7] See Part II., Chapter VI., Section 47.

nuptias or "before marriage." The Emperor Justin permitted gifts so made before marriage to be increased after marriage, and Justinian even permitted gifts given in contemplation of marriage to be made after marriage, and in view of that permission rendering the designation of such a gift as "antenuptial" strictly incorrect, the name was altered to *donatio propter nuptias*, or a gift made "in respect of" marriage, which applied equally whether the gift were antenuptial or postnuptial.[1]

SECTION 85.—DONATION MORTIS CAUSA[2]

A donation *mortis causâ* was a gift made in contemplation of death, and conditional upon that event taking place, until which time it was revocable by the donor. Such a gift was consequently ineffective if the donee predeceased the donor.[3]

A donation *mortis causâ* might competently be made conditionally upon the death of a person other than the donor, as, for example, if a father promised a gift to his son's wife in the event of her husband's death.[4] A donation *mortis causâ* might be made conditional upon death in either of two ways,[5] namely—(*a*) the completion of the gift by delivery might be intended to take place only if, and when, the donee survived the date of the contemplated death, upon which event the delivery of the property was made conditional, and until which event it remained the property of the donor, who could vindicate it by a "real" action (*in rem*), or (*b*) delivery of the thing might be made at once to the effect of making it immediately the property of the donee, but conditional upon a re-transfer to the donor in the event of the donor, or the other person in contemplation of whose death the gift was made, not dying as was expected.[6]

A donation *mortis causâ* could be revoked by the donor at any time up to the death contemplated in respect of which it was given, for it did not receive complete effect until that event; and revocation was, moreover, irrespective of whether delivery had taken place or not: such a donation was also impliedly rescinded by the predecease of the donee,[7]

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[1] Justinian, *Inst.* ii. 7, 3; *Code*, v. 3, 19, 20. See on donations *ante* and *propter nuptias*, Part II., Chapter VI., Section 47.

[2] *Dig.* xxxix. 6; Justinian, *Inst.* ii. 7.

[3] *Cf.* Sohm, *Inst.*, 3rd ed., 212. "A *donatio mortis causâ* is a gift conditional on the donee's surviving the donor."

[4] *Dig.* xxxix. 6, 11.

[5] Cf. *Dig.* xxxix. 6, 29.

[6] "In short, it is a donation *mortis causâ* when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir" (*et in summa mortis causâ donatio est, cum magis se quis velit habere, quam eum, cui donatur, magisque eum cui donat, quam heredem suum*). Justinian, *Inst.* ii. 7, 1.

[7] *Dig.* xxxix. 6, 23.

and also by the insolvency of the donor.[1] A donation *mortis causâ* that was made in view of some particular danger threatening the donor and involving serious risk of death, was impliedly rescinded by the fact of the donor surviving the threatened danger.[2] A donation *mortis causâ* became void if the donor underwent capital punishment.[3] The donor might at any time convert a donation *mortis causâ* into one *inter vivos*, in which case it would become at once irrevocable in accordance with the rules applying to such a form of donation. All persons who could validly make and who could validly take under a testament could also validly make or receive under a donation *mortis causâ*,[4] and every kind of thing *in commercio* could be the subject of such a gift. Justinian required, however, that a donation *mortis causâ*, if exceeding 500 *solidi* in value, should either be registered in a public register or be made in presence of five competent witnesses;[5] but otherwise no special form was prescribed by the law for the making of such a gift.

In the time of Justinian a donation *mortis causâ* partook in most respects of the character of a legacy,[6] and the rules as to the capacity to give and to take such a gift were for the most part the same as those which governed legacies.[7] A donation *mortis causâ* has been said to stand midway between a legacy and a donation *inter vivos*, because in certain respects it resembles, and in other respects it differs from each.[8] A donation *mortis causâ* resembled a legacy in respect that it only took effect upon death, and also in respect that it only took effect if sufficient assets remained after the deduction of the debts due by the donor, and was impliedly rescinded by the predecease of the donee.

A donation *mortis causâ* differed from a legacy chiefly in respect that it took effect immediately upon the death of the donor without the necessity of the heir accepting and entering upon the inheritance (*hereditas*), whereas a legatee acquired no right until after the heir's acceptance and entry;[9] it also differed from a legacy in respect that the capacity of the person receiving the gift was considered only as at the time of the death, and not, as in the case of legacies, as at the time when the disposition was made; moreover, a *filiusfamilias* could make, with his father's consent, even before the time of Justinian, a donation

[1] Cf. *Dig.* xxxix. 6, 17.
[2] *Cf.* Moyle, *Inst.* 233; *Dig.* xxxix. 6, 29; xxxix. 6, 30.
[3] *Dig.* xxxix. 6, 7.
[4] *Dig.* xxxix. 6, 9. Cf. *Dig.* xxxix. 6, 35 pr.
[5] *Code*, viii. 57, 4.
[6] Justinian, *Inst.* ii. 7, 1.
[7] Cf. *Dig.* xxxix. 6, 37 pr.; Sohm, *Inst.*, 3rd ed., 578.
[8] *Cf.* Moyle, *Inst.* 232.
[9] *Dig.* xxxix. 6, 29.

mortis causâ of property other than his *peculium castrense*, although he could not do so by testament,[1] and a "peregrin" could give a donation *mortis causâ*, although he could not give a legacy.[2]

A donation *mortis causâ* differed from a donation *inter vivos* in respect that it only took complete effect upon the death[3] of the donor, or of the third person, if any, upon whose death the gift was conditional, until which time it was revocable, whereas a gift *inter vivos* was immediately effective and irrevocable, except upon certain specified grounds.

The main difference between a donation generally, whether in the form of one *inter vivos* or *mortis causâ*, and a legacy is that the former consists of "a present act of bounty,"[4] although it may not take effect at once, whereas a legacy was a charge upon the succession (*hereditas*), giving rise to a claim against the heir.[5]

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[1] *Dig.* xxxix. 6, 25, 1.

[2] *Dig.* xxxix. 6, 25.

[3] *Dig.* xxxix. 6, 32.

[4] Moyle, *ut supra*; *Dig.* xxxix. 6, 39.

[5] See upon donations generally, Hunter, *Roman Law*, 318, 915-917; Moyle, *Institutes of Justinian*, 4th ed., 232-237; Sandars, *Institutes of Justinian*, 147-153; Buckland, *Roman Private Law*, 100-102; Girard, *Manuel de Droit Romain*, 5th ed., 936-949; Cuq, *Institutions Juridques des Romains*, ii. 679-696; Sohm, *Institutes of Justinian*, 3rd ed., 211, 212, and 578.

CHAPTER VII

Termination of Ownership

Ownership (*dominium*) might end in either of two ways, namely (1) by the object of ownership ceasing to exist, or (2) by the right of ownership becoming extinguished.

The object of ownership might cease to exist by reason of either its actual physical destruction, or its juristic destruction, such as, for example, by capture in war, or by emancipation of a slave.

The right, as distinguished from the object of the right of ownership, might be terminated or extinguished either by the transfer of the property to someone else, or by the dereliction or abandonment of the property by the owner.

CHAPTER VIII

"Real" Rights Less than Ownership

Rights in the Property of Another Person[1]

The Roman Law recognised that the rights of a person might extend not only over his own property, but also over the property of other persons, or, stated conversely, that the absolute rights of a person as owner of his property might be limited or restricted in favour of some other person.

Four different kinds of rights over the property of another person (*jura in re aliena*) which did not amount to full ownership were recognised by the Roman Law under the respective names of (1) *servitus* or "servitude"; (2) *pignus* or pledge[2] (including *hypotheca*); (3) *superficies;*[3] and (4) *emphyteusis.*[4]

Section 86.—Servitudes Generally[5]

A servitude has been defined as "a real right vested in or annexed to a definite person or piece of land, over some object belonging to another, and limiting the enjoyment of that object in a definite manner."[6]

The property or object over which a right of servitude is created, whether for the benefit of some other property, or of some other person, is said to "serve" or to be subject to that other property, or person, and the *dominium* or absolute right of the owner of the "servient" or

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[1] *Jura in re aliena.* "A right over a definite tangible object is called a *jus in re*, or real right; if the object be our own it is *jus in re propria;* if some one's else, *jus in re aliena*" (Moyle, *Inst.* 214).

[2] See *post*, Part IV., "Obligations."

[3] See *post*, Section 97, p. 272.

[4] See *post*, Section 96, p. 269.

[5] Justinian, *Inst.* ii. 3, 4, 5; *Dig.* viii. See also, on servitudes generally, Cuq, *Institutions Juridiques des Romains*, ii. 265-268; Girard, *Manuel de Droit Romain*, 356-384; Hunter, *Roman Law*, 4th ed., 394-420; Mackenzie, *Roman Law*, 182-190; Moyle, *Institutes of Justinian*, 4th ed., 214-224; Sandars, *Institutes of Justinian*, 118-133; Sohm, *Institutes of Roman Law*, 3rd ed., 338-348; Buckland, *Principles of Roman Law*, 110-115; Poste, *Institutes of Gaius*, 3rd ed., 128-132.

[6] Moyle, *Institutes of Justinian*, 4th ed., 214.

"subject" property (*res serviens*) is limited directly in proportion to the extent of the servitude right.

The right of servitude may have either of two effects, for by reason of it an owner of property may either (*a*) be restrained from the full use of his property, or (*b*) be obliged to allow some other person to do something upon his property; in other words, a servitude compels an owner of property either to allow something to be done on his property, or to refrain from himself doing something on his own property. A servitude may thus be briefly defined as a burden imposed upon the ownership and the full use of property.

The Roman Law divided servitudes into two great classes, namely (1) "praedial" servitudes, and (2) "personal" servitudes, according as the right was granted in favour of a particular property, or of a particular person respectively. A "praedial" servitude was a burden imposed upon a particular immovable property (*praedium*)[1] in favour of the owner of another particular immovable property, whoever that owner might happen to be for the time being.

A "personal" servitude was a "real" right (*jus in rem*) granted to a particular person over the property of another person irrespective of what property, if any, the grantee of the right might already own. The essential ground of distinction between "praedial" and "personal" servitudes was according as the individual enjoying the right of servitude exercised his right in virtue of being the owner of a *praedium* or immovable property, such as land, or a building upon the land, or independently of the ownership of any *praedium;* in the latter case the servitude was said to be a "personal" one.

It will thus be seen that a "praedial" servitude is one created for the benefit of another *praedium* or property irrespective of who may, for the time being, happen to own it, whereas a personal servitude exists for the benefit of a particular person without regard to what, if any, property the person may happen to own.

It is obvious that no one can have a servitude over his own property; the Romans expressed this by the maxim *nulli res sua servit*:[2] a right of servitude is a part of a person's property and the owner of the whole is necessarily owner of all the parts; so that a right of servitude would be extinguished and become merged in the *dominium* if the person in right of it should become owner of the servient property, or the converse. Moreover, as a servitude right was a limitation of and a deduc-

[1] There is no exact English equivalent for the word *praedium*, but the term "immovable" most nearly expresses it. In French, however, the word "*immeuble*" exactly corresponds to *praedium*. *Cf.* Sandars, *Institutes of Justinian*, 118.

[2] *Dig.* viii. 2, 26.

tion from the full right of the servient owner it did not, except in one instance,[1] impose upon him anything more than a passive duty either himself to refrain from doing something, or to permit something to be done with property belonging to him.[2] In other words, a servitude consists either in not doing, or in suffering something to be done,—*in non facicendo* or *in patiendo*;[3] to require something positive to be done would be to impose a still greater burden upon an already restricted right of ownership. From the fact that a servitude was a limitation of, and a burden upon the right of ownership, its existence was not presumed by the law, and the person claiming to exercise it required to prove both the existence and the extent of the right.

The Roman Law required that the owner of the property burdened with a servitude should do nothing to impede the dominant owner in the exercise of his right, but the person in enjoyment of the right of servitude was bound, on his part, to exercise his right in the manner that was least inconvenient to the servient owner, or burdensome to the property, the object being to emphasise as little as possible the fact of the limitation of the full rights of ownership.

The nature of both praedial and personal servitudes will now be considered more particularly.

SECTION 87.—PRAEDIAL SERVITUDES[4]

A "praedial" servitude has been already defined[5] as a burden imposed upon a particular immovable property (*praedium*) in favour of the owner of another particular immovable property, whoever that owner might happen to be for the time being. A "praedial" servitude thus implies the existence of two immovable properties (*praedia*), one of them having attached to or inherent in it the right to enjoy the servitude, while the other has placed upon it the burden of submitting to the enjoyment of the servitude right; the former property is the "dominant" one (*praedium* or *res dominans*), and the latter is the "servient" property (*praedium* or *res serviens*). "Praedial" servitudes were of either of two kinds, known respectively as "rural" servitudes (*servitutes praediorum rusticorum*) and "urban" servitudes (*servitutes praedorium urbanorum*). The distinction between "rural" and "urban"

[1] *I.e.* the servitude of support (*servitus oneris ferendi*). See *post*, p. 255.

[2] Cf. *Dig.* viii. 1, 15, 1: "*Servitutium non ea natura est, ut aliquid faciat quis . . . sed ut aliquid patiatur, aut non faciat.*"

[3] This connotes the distinction between "negative" and "positive" or "affirmative" servitudes, upon which see *post*, p. 252.

[4] *Cf.* Cuq, *Institutions Juridiques des Romains*, ii. 268-273.

[5] *Ante*, p. 250.

servitudes consisted in the fact that the former were exercised over the land or soil itself, such as a right of passage, whereas the latter were exercised over things erected upon the surface (*superficies*) of the soil, such as buildings.[1] A "rural" servitude is thus one which either wholly or mainly affects the soil itself and can exist apart from anything built or erected upon the soil, whereas an "urban" servitude is one which either wholly or chiefly affects erections upon the soil and cannot exist without them. "Rural" servitudes are, for the most part, positive or affirmative, requiring that the person in right of them should enjoy his right by the doing of some definite act, whereas "urban" servitudes are mainly negative, requiring merely abstention from the doing of some act on the part of the servient owner without the performance of any positive act on the part of the dominant owner.

Servitudes of urban and of rural immovables are also further distinguished as being either continuous or discontinuous. A "continuous" servitude is one which is continuously in course of being enjoyed, and a "discontinuous" servitude is one that is only exercised intermittently, from time to time; thus, for example, a servitude of support (*oneris ferendi*) is continuous, for there is no moment at which the support is not being given, whereas a servitude of passage or way is discontinuous, for the right is only exercised at intervals, and the way is not being used without intermission.

The "urban" servitudes were mostly continuous and the "rural" servitudes were mainly discontinuous.

> The distinctions between servitudes of rural and urban immovables with respect to their positive or negative, and their discontinuous or continuous characters created an important difference in the modes in which these two kinds of servitude might be terminated through not being used, to the effect of barring the dominant owner from thereafter claiming to exercise his right. A continuous r a negative servitude, on the one hand, such as that of an urban immovable, could be lost by non-use only if and when the servient owner did some act that was inconsistent with the existence of the right of servitude and the dominant owner, at the same time, acquiesced in the act by failing to assert his right within the period allowed by law to do so. A discontinuous or a positive or affirmative servitude, on the other hand, such as that of a rural immovable, was lost by mere non-use throughout the ordinary prescriptive period; for such servitudes required to be kept existent by the performance of certain positive acts on the part of the dominant owner, and they therefore terminated if he permitted the period of the negative prescription to elapse after the last exercise of his right.[2]

[1] Cf. *Dig.* viii. 1, 3.

[2] *Cf.* on loss on servitudes by non-use, *Dig.* viii. 2, 6. Before the time of Justinian the period was two years (Paul, *Sent.* i. 17, 1), but Justinian extended the

(*a*) Rural Servitudes (Servitutes praediorum rusticorum)[1]

The principal rural servitudes known to the Roman Law were those of way or passage, under the names of *iter*, *actus*, and *via*, of water, under the names of *aquaeductus* and *aquaehaustus*, of pasturing cattle (*jus pascendi pecoris*) and of watering cattle (*pecoris ad aquam appulsus*) upon the land of another.[2] There were, moreover, a number of rural praedial servitudes of lesser importance in respect of which the owner of the dominant property might be entitled to do other acts on the servient property, such as to quarry stone (*jus lapidis eximendae*),[3] to take away sand (*jus arenae fodiendae*)[4] or chalk (*jus cretae eximendae*), to burn lime (*jus calcis coquendae*),[5] or to cut stakes or props for vines, and to do other such acts.

It has been already observed[6] that the rural servitudes were mostly affirmative, since, from their nature, they gave to the dominant owner a right to do some positive act upon the servient property, and from this circumstance, moreover, the right to do the particular act authorised by the servitude might be lost by non-use through the mere lapse of the ordinary period of negative prescription.

Iter—Actus—Via[7]

These three servitudes may be said to make up together the three degrees of the modern servitude of "passage" or "way" which, in most modern systems, comprises a foot road, a horse road, and a cart or carriage road.

Iter was a right of way or passage over the land of another person by means of walking, riding, or being carried, as in a litter or hammock, but it did not give any right to drive a beast or a vehicle through the property.

Actus was a right to use a road through the property of another person for driving beasts, or carriages, and, as the larger right, it included the rights created by *iter*.

Via was the most extensive right of passage, and included not only the rights comprised under *iter* and *actus*, but also the right to use the

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prescriptive period applicable to servitudes to ten and twenty years respectively according as the parties were in the same or were in different provinces (*Code*, iii. 34, 13).

[1] Justinian, *Inst.* ii. 3 ; *Dig.* viii. 3.

[2] *Inst.* ii. 3 pr. ; ii. 3, 2.

[3] *Dig.* viii. 4, 13, 1.

[4] *Inst.* ii. 3, 2.

[5] *Inst.*, *ut sup.*

[6] P. 252.

[7] Justinian, *Inst.* ii. 3 pr. ; *Dig.* viii. 3, 1.

road for every kind of carriage or vehicle, and for the traction of wood, or of stones, and other heavy materials.

In general the larger of the forms of rights of way included the lesser ones, but there was nothing to prevent the limitation of the right by express agreement; so that, for example, a right of driving cattle, or of drawing heavily-laden waggons, might be granted expressly upon condition that the way should be used only when engaged in doing the particular act or acts sanctioned by the servitude.

A right of way was not necessarily only over land; it might be granted over private water, such as a lake, in the form of a *jus navigandi* or a "right of navigation."[1]

In the case of a servitude of way or passage, the Roman Law did not impose upon the servient owner any obligation to maintain or to keep in repair the road for the benefit of the dominant owner, and for the better enjoyment of his right; but, on the other hand, the servient owner could not object to the dominant owner repairing and maintaining the road if he did so at his own expense, and he was therefore bound to permit the dominant owner or his workmen to come on to his property at reasonable times, and in reasonable circumstances, for the purpose of the repair or maintenance of the road.

AQUAEDUCTUS.[2]—This was the servitude "of leading water," and it was one which entitled an owner of land to conduct water by means of canals, or drains, or pipes through the ground of another owner. The dominant owner was bound to maintain the aqueduct in good repair so as to prevent any injury being occasioned to the servient property, and the servient owner was correspondingly bound to allow to the dominant owner reasonable access to his property for that purpose.[3]

AQUAEHAUSTUS.—This was the servitude "of drawing water," and it entitled a person to go on to the property and draw water from the well or fountain of another person. The person in right of this servitude was also entitled to reasonable access to the well in order to keep it in repair. A servitude of drawing water might be either praedial or personal, according to the specific terms of its constitution,[4] but in the absence of an express provision otherwise it was presumed to be praedial.[5]

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[1] *Dig.* viii. 3, 23, 1.

[2] Justinian, *Inst.* ii. 3 pr.; *Dig.* viii. 3, 1 pr.

[3] Cf. *Dig.* xliii. 21, 1 pr.

[4] Cf. *Dig.* viii. 3, 37.

[5] *Dig.* viii. 3, 20, 3. *Cf.* also *Dig.* viii. 5, 20, 1, with regard to a servitude of pasturage; and *Dig.* viii. 3, 4, as to a servitude of watering cattle.

Like the servitude of drawing water (*aquaehaustus*) the servitudes of pasturing cattle (*jus pascendi pecoris*), and of watering cattle (*pecoris ad aquam appulsus*) upon the land of another person might be either praedial or personal according to the special terms of the grant, but in the absence of any agreement or indication to the contrary effect they were presumed to be praedial.[1] Servitudes of pasturage, and of watering cattle, involved and necessarily included the right to drive the cattle on to the servient land; in other words, the right of *actus*.

(*b*) URBAN SERVITUDES (SERVITUTES PRAEDIORUM URBANORUM)[2]

"Urban" servitudes, as has been already stated,[3] were rights existing over the surface (*superficies*) of the land, and not over the soil itself, and therefore related and applied to erections, in the shape of buildings, or houses of any description, placed upon the surface of the soil, irrespective of whether they were situated in a town or in the country.

The principal "urban" praedial servitudes in the Roman Law were (1) *oneris ferendi*, or the servitude "of bearing a burden,"—in other words, the servitude of support; (2) *tigni immittendi*, or the right "of inserting a beam" in a neighbour's wall; (3) *stillicidii recipiendi*, or the servitude imposing the duty of receiving rain-water falling, or flowing from another man's house; (4) *altius non tollendi*, or the servitude imposing a duty "of not building higher."

Oneris ferendi.—This servitude "of bearing a burden," or of "support," gave to the dominant owner a right to rest either the whole or a part of a building upon, and to have it thereby supported by, the house wall, or the pillars, or property of the servient owner. This servitude of support imposed upon the servient owner a duty to keep his property in such repair as to be in a proper condition to bear the burden, and if he did not fulfil this legal duty he was liable for any loss occasioned to the dominant owner through his failure to do so.[4] The servitude of support is the only case in which there was imposed by the Roman Law upon the servient owner a positive as distinguished from a merely passive duty.[5]

Tigni immittendi.—This was the servitude "of inserting a beam,"

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[1] *Dig.* viii. 3, 4; viii. 5, 20, 1.
[2] Justinian, *Inst.* ii. 3, 1; *Dig.* viii. 2, 2.
[3] *Ante*, p. 252.
[4] *Dig.* viii. 5, 6, 2.
[5] Cf. *ante*, p. 251.

and it gave to the dominant owner a right to place or fix a beam or joist in the wall of another man's house. The right so created, however, by this servitude was a bare one, and consequently did not impose upon the servient owner any obligation to keep his wall in repair;[1] in this respect the servitude *tigni immittendi* was in marked contrast with that of support to a building (*oneris ferendi*), which put upon the servient owner a positive duty to keep his property in a state fit to sustain the burden.[2]

Stillicidii recipiendi.—This is, literally, the servitude "of receiving raindrops." The word *stillicidium* meant rain-water falling from the roof of a house. This servitude, which is usually known as "stillicide," had two aspects, according to which the house from which the raindrops fell might be either the dominant or the servient property. It might be, on the one hand, that the servitude was constituted in order that the adjoining property might get the benefit of the water, in which case the house would be the servient property, and the owner of it would be bound to do nothing to prevent the flow of the water on to the neighbouring property; or, on the other hand, the servitude right might have been granted in order to enable the owner of the house to dispose of the water so falling upon his house, in which case he would be the dominant owner. In the ordinary case, when there was no express servitude of stillicide, the Roman Law obliged owners of property to build sufficiently far within the boundaries of their land to ensure that the rain-water running off the roof should not fall upon the adjoining property.

Altius non tollendi.—This was the servitude "of not building higher," and it gave to the dominant owner the right to prevent the owner of the servient property from either building beyond a certain height on his own land, or so constructing buildings upon his land as to interfere with or injure the light or view of the dominant owner; in the latter case this servitude was combined with the servitude "of not shutting out light or view" (*non officiendi luminibus vel prospectui*), which was a combination of the servitude of "light" (known as *ne luminibus officiatur*), and the servitude of "view" (known as *ne prospectui offendatur*). The servitudes of "light" and of "view" together restrained the servient owner from in any way, and to any degree intercepting, by buildings, walls, hoardings, trees, or otherwise, the light coming to the house of the dominant owner, as rendering the view from his house less free and pleasing.[3] "Light" (*lumen*) in the sense of this servitude signified

[1] *Dig.* viii. 5, 8, 2.
[2] *Dig.* viii. 5, 6, 2.
[3] *Dig.* viii. 2, 4; viii. 2, 15; viii. 2, 17, 1.

uninterrupted vision towards the sky, while "view" (*prospectus*) meant uninterrupted vision over the lower grounds (*ex inferioribus locis*).[1]

In the absence of express building restrictions, an owner of land was ordinarily entitled, by the Roman Law, to build to any height, or to construct buildings in any manner he pleased, irrespective of what injury or inconvenience he might cause thereby to adjoining owners.[2]

A servitude sometimes took the form of the grant of a right to occupy space above the land of another, in which case it was known as the servitude *projiciendi* (or *protegendi*) or "of projecting" or "overhanging." This servitude was designed to meet the cases of projections in the form of the eaves of houses, or of balconies.[3] It will be seen that this right was merely one of overhanging a neighbour's land, and was entirely distinct from a right of support, and from a right to rest a beam on a neighbour's wall. In the absence of an express "right of projection" (*jus projiciendi*), an owner of land was considered as being the owner also of all the air space above his property.

(*c*) Essential Characteristics of Praedial Servitudes

In order that a "praedial" servitude should have been properly constituted the following elements were essential:—(1) There must be two estates (*praedia*), namely, the "dominant" and the "servient" one; (2) the burden of the servitude must have been imposed in order to increase the permanent better enjoyment of the dominant property; in other words, there required to be a *causa perpetua* or "continuing reason" for the servitude;[4] (3) the servitude right must be one inherent in and inseparable from the dominant estate, irrespective of who the owner may be; (4) the two estates (*praedia*) must be so situated that the one can be of actual use to the other. It was not necessary that the two estates should actually adjoin each other, but a servitude could not exist if it was incapable of being used by reason of the position of the two estates. Thus a person could not, for example, have a right-of-way over the land of another if he could not use it by reason of the fact that land over which he had no right of servitude lay between his land and the property over which the right was to be exercised; (5) the servitude must be indivisible; from which it follows that if the dominant estate was divided, the owners of each of the

[1] *Dig.* viii. 2, 16.
[2] *Dig.* viii. 2, 9.
[3] *Dig.* l. 16, 242, 1.
[4] Cf. *Dig.* viii. 1, 15 pr.

separate parts would have similar and equal rights over the servient property; (6) a servitude must be unconditional;[1] and (7) one servitude cannot serve another; for each is merely a part of a greater whole, without which it has no existence.

SECTION 88.—CONSTITUTION OF SERVITUDES

In the time of Justinian servitudes might be constituted or created (1) *pactionibus et stipulationibus* or "by pacts and stipulations,"[2] which was the clothing of the terms of the agreement with the sanction of a formal stipulation; (2) *testamento*, or "by testament," through directing the heir to permit the servitude-right to be exercised;[3] (3) by prescription or mere lapse of time; (4) by reservation (*deductio*), through reserving the servitude-right when giving possession or making "tradition" of the property;[4] (5) by adjudication in the form of an award by the Court of the servitude right in either an *actio familiae erciscundae* or in an *actio communis dividundi*;[5] (6) *lege*, or by mere operation of law, or by express enactment, as when Justinian gave the usufruct of one-half of the *peculium adventitium* to the paterfamilias upon the son's emancipation.[6]

Prior to the time of Justinian, servitudes could also be created by *mancipatio*, *in jure cessio*, and *usucapio*. The two first methods were obsolete by the time of Justinian, and a statute known as the *Lex Scribonia*, but the date of which is uncertain, limited *usucapio* to the acquisition of praedial servitudes only when appurtenant to land that had itself been acquired by "usucapion."

SECTION 89.—EXTINCTION OF SERVITUDES

Servitudes generally were extinguished or terminated by (1) renunciation (*remissio*); (2) consolidation (*confusio*); (3) circumstances emerging inconsistent with the exercise of the right; (4) non-usage (*non utendo*); (5) expiry of the period fixed for the duration of the servitude; the "personal" servitudes of "usufruct" (*usufructus*) and

[1] This was strictly so in theory, in that a servitude could not be created to date from a future day or event, or be limited in its duration, but in practice such limitations, if agreed upon, formed a ground of defence to an action suing for enforcement of the servitude right. *Cf.* Hunter, *Roman Law*, 420.

[2] Justinian, *Inst.* ii. 3, 4.

[3] *Cf.* Justinian, *Inst.*, *ut supra.*

[4] *Dig.* viii. 4, 10; cf. *Dig.* viii. 2, 34; viii. 4, 6 pr.

[5] *Dig.* vii. 1, 6, 1. See an "Adjudication," *ante*, p. 217, note 3.

[6] Justinian, *Inst.* ii. 9, 1; *Code*, vi. 61, 6; see *ante*, Part II., Section 31 (*d*), p. 129.

"use" (*usus*) were also specially extinguished by death and *capitis deminutio*.[1]

(a) *Renunciation of a Servitude*

This is otherwise known as "remission" (*remissio*), and took place when the dominant owner released the servient owner from the obligation.

In the earlier state of the Roman Law renunciation or remission of a servitude was effected by the procedure of *in jure cessio* or surrender in Court in a fictitious action at law, but in the later state of the law it was operated either by express agreement or by the owner of the *res dominans* permitting an act the exercise of which was inconsistent with the right of servitude.

(b) *Consolidation of a Servitude*

This is otherwise known as "confusion" (*confusio*), and took place if both the dominant and servient estates (*praedia*) became the property of the same person; and, in the case of personal servitudes, by the usufructuary, or by the user becoming the owner of the property over which their rights were exercised. The servitude, in such cases, was held to have been extinguished *confusione* or "by confusion."

(c) *Circumstances Emerging and Extinctive of Servitudes*

It may happen that circumstances arise that render a servitude useless, as where, for example, either or both of the properties are destroyed; but the destruction required to be complete and permanent, and not merely temporary, in order to extinguish a servitude; so that if, for instance, a building to which a servitude was attached was pulled down in order to be rebuilt, the right would not be extinguished by the destruction of the building, but would be merely suspended, and it would revive upon the completion of the rebuilding.[2]

Non-usage as extinctive of servitude rights has been already considered, and also the difference in its operation according as the servitude was "rural" or "urban."[3]

SECTION 90.—PERSONAL SERVITUDES[4]

It has been already pointed out that the essential distinction between "praedial" and "personal" servitudes depended upon whether a person

[1] See *post*, pp. 264 and 267.

[2] *Dig.* viii. 2, 20, 2.

[3] *Ante*, Section 87, p. 252.

[4] See Justinian, *Inst.* ii. 4; ii. 5; *Dig.* vii.; Cuq, *Institutions Juridiques des Romains*, ii. 273-286; Girard, *Manuel de Droit Romain*, 5th ed., 363-374; Hunter,

enjoyed the right because he was the owner, for the time being, of a particular property (*praedium*) or exercised the right independently of any property of which he might happen to be owner.[1]

There were four kinds of rights in the property of another person (*jura in re aliena*) which the Roman Law classed as "personal" servitudes, because of the fact that they were created and existed for the benefit of a particular person independently of what property he might possess, and not for the benefit, or the better enjoyment of any particular property or estate.

The four classes of "personal" servitudes were (1) usufruct (*usufructus*); (2) use (*usus*); (3) habitation (*habitatio*); and (4) the services of animals (*operae animalium*), or the services of slaves (*operae servorum*), or of both. The most important of these, from the point of view of modern practical value, is usufruct.

SECTION 91.—USUFRUCT (USUFRUCTUS)[2]

This is defined as a right to use property belonging to someone else, and to enjoy its fruits and profits without in any way impairing or affecting the substance of the thing itself.[3]

The right of usufruct comprised three lesser rights, namely, (1) the right to possess the property (*jus possessionis*); (2) the right to use the property (*jus utendi*); and (3) the right to enjoy the fruits of the property (*jus fruendi*). The right to use the property (*jus utendi*) was, by itself, a right to make full use of the property in all proper ways, but neither to take the fruits of it, nor to consume it.

The right to enjoy the fruits of the property (*jus fruendi*) was a right to take all the ordinary produce of the property, whether natural, or industrial, or civil,[4] over which the right of servitude had been created; but this right did not extend to or include chance accessions to the property usufructed, such as islands formed in a river, or treasure-trove.[5]

Roman Law, 4th ed., 394-412; Mackenzie, *Roman Law*, 7th ed., 187-190; Moyle, *Institutes of Justinian*, 4th ed., 221-224; Poste, *Institutes of Gaius*, 4th ed., 131, 132; Sohm, *Institutes of Roman Law*, 3rd ed., 338-348; Buckland, *Principles of Roman Law*, 110-115; Sandars, *Institutes of Justinian*, 125-133.

[1] *Ante*, Section 86, p. 250.

[2] Justinian, *Inst.* ii. 4; *Dig.* viii. See Roby, *De Usufructu* (Camb. Univ. Press, 1886); Cuq, *Institutions Juridiques des Romains*, 275-283; Girard, *Manuel de Droit Romain*, 5th ed., 363-370.

[3] *Inst.* ii. 4 pr.; *Dig.* vii. 1, 1, 2. *Cf.* French Civil Code, Arts. 578-582.

[4] See "Rights of the Usufructary," *post*, p. 262. See also upon "fruits" generally, *ante*, p. 227, and *post*, p. 262; and *cf.* Girard, *Manuel de Droit Romain*, 5th ed., 249, 321, and 366. *Cf.* also French Civil Code, Art. 582.

[5] Cf. *Dig.* xxiv. 3, 7, 12.

The kind of property which was regarded by the Roman Law as capable of being the object of a proper usufruct included such things as land, houses, animals, slaves, and other such forms of property as are not consumed in the course of their ordinary use,[1] and which can be restored to their owner intact upon the expiry of the servitude right;[2] only "non-fungible" things, therefore, could be the object of a proper usufruct.[3]

(a) *How Usufruct was Constituted* [4]

Usufruct was constituted by (*a*) agreement,[5] (*b*) testament, (*c*) reservation, (*d*) law (*lege*), and, under the earlier law, by (*e*) *in jure cessio*.[6]

The person in whose favour a right of usufruct was created was known as the *usufructuarius* or "usufructuary"; and the owner (*dominus*) of the property over which another person had a usufruct was restricted from exercising the rights of full ownership (*plenum dominium*), these being temporarily restricted, during the subsistence of the usufruct, to a "bare ownership" (*nuda proprietas*) or a nominal ownership without the power of exercising the rights ordinarily incidental to ownership; for the possession, use, and enjoyment of the property was not with the owner but with the usufructuary.

When a usufruct was constituted by "reservation" (*deductio*) there might be either a delivery (*traditio*) of the bare ownership (*nuda proprietas*), accompanied by a reservation of the servitude right, or the usufruct might be granted with a reservation of the bare right of ownership.

A right of usufruct might be created, like any other servitude,[7] by

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[1] *Res quae in usu non consumuntur.*

[2] Justinian, *Inst.* ii. 4, 2; *Dig.* vii. 1, 3, 1.

[3] By the operation of a *Senatus-consultum* of uncertain date, but generally ascribed to the time of either Augustus or Tiberius, a *quasi*-usufruct, or rights resembling a usufruct, might be given over "fungible" property or things that are consumed in the course of their ordinary use (*res quae usu consumuntur*), if the usufructuary gave security that, on the expiry of his right, he would give to the owner property of a kind similar to that which he had received, and equivalent in quality and quantity, or, alternatively, pay to the owner the equivalent value of the property. In actual practice the value of the fungibles in such a case was fixed at the commencement of the *quasi*-usufruct, and paid on its expiration. See Mackenzie, *Roman Law*, 187; Sandars, *Institutes of Justinian*, 127, 128. Cf. *Dig.* vii. 5, 7; *Inst.* ii. 4, 2.

[4] *Dig.* vii. 1, 6. See "Constitution of Servitudes, Generally," *ante*, Section 88, p. 258.

[5] By pacts and stipulations.

[6] Although under the early law a usufruct could be created by *in jure cessio*, it could not be constituted by *mancipatio*, which was only competent to create rural praedial servitudes on Italian soil. Both *in jure cessio* and *mancipatio* as modes of creating servitudes were obsolete by the time of Justinian.

[7] See *ante*, p. 258.

law (*lege*) or express legal enactment, and apart altogether from either agreement or testament. An example of this is the usufruct expressly accorded by Justinian's legislation to a father over his son's *peculium adventitium* both before and after emancipation.[1]

(b) *Rights of a Usufructuary*[2]

The usufructuary was entitled to the full use of the property, in virtue of the *jus utendi*, and to all the fruits and profits of the subject usufructed, both natural and civil, in respect of the *jus fruendi;* but his right to the fruits of land only emerged and became so vested in him as to pass to his heir or representatives in the event of his death after he had reaped or gathered them.[3] The usufructuary was entitled to the natural increase of animals as being natural fruits of the subject usufructed, but he had no right to the offspring of slaves, because, as explained by Ulpian, slaves were given in usufruct for the sake of their labour only.[4] The "civil" fruits to which the usufructuary had right were any profits derived by him through selling, or letting, or giving the right of taking the fruits to anyone other than himself.

The "fruits" and "profits" of a subject usufructed included the stock and implements of a farm, and the produce of pits, or quarries, or mines, if already opened at the time of the commencement of the usufructuary's right; and although there was some conflict of opinion amongst the Roman jurists, the weight of authority seems to have favoured the view that a usufructuary might even open new pits, or mines, or quarries, if by so doing he did not thereby affect the profitable cultivation of the land, or change the character of the property.[5]

The right of usufruct was personal to the usufructuary to whom it had been given. In this connection it is necessary to distinguish between the right of usufruct itself and the exercise of the right. The right of usufruct, being personal to the grantee, was, like any other servitude, inalienable, and could be neither transferred nor disposed of; but the exercise of the right, as distinct and apart from the right itself, might be transferred by the usufructuary to another person either gratuitously or for a consideration: thus the usufructuary might gift, or sell, or lease, or otherwise dispose of the exercise of the right, but he could not dispose

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[1] See *Inst.* ii. 9, 1; also *ante*, Section 31 (*d*), p. 129.

[2] *Cf.* French Civil Code, Arts. 582-599.

[3] Justinian, *Inst.* ii. 1, 36. *Cf.* Girard, *Droit Romain*, 5th ed., 249, 321, 366.

[4] See Mackenzie, *Roman Law*, 188; and cf. *Inst.* ii. 1, 37; and *Dig.* v. 3, 27.

[5] Cf. *Dig.* vii. 1, 13, 5. Even this might be immaterial if the opening and working of the mines or quarries was, in fact, a better use of the property (Hunter, *Roman Law*, 400).

of the right itself, and he himself continued to be liable for all the obligations created by the right, and he could not free himself from these obligations by any form of transfer.[1]

(c) *Duties of a Usufructuary*[2]

The usufructuary was bound to exercise his right as a good *paterfamilias* or a prudent man, and to exercise all reasonable care as such in the enjoyment of the subject so that its substance might be preserved intact, and to restore it in that condition to the owner when his right expired, and he might be compelled to give security (*cautio usufructuaria*) to that effect if there was risk of waste or loss.[3] So a usufructuary was bound to cultivate with the care of a good husbandman; if the subject usufructed included vines, or fruit-trees, it was his duty to replace any that had decayed, or had suffered accidental loss, and he was bound, in the same way, to maintain flocks, or herds, or other such stock at their normal numbers out of their produce,[4] which otherwise belonged to himself.[5] The usufructuary was bound to execute all reasonable and necessary repairs upon the subject, and to pay any ordinary annual burdens that might be upon it.[6] A usufructuary was not entitled to change the character of the property usufructed, or alter the nature of the property subject to his right, even although the change might render the property more valuable, or to put the property to a use inferior to that for which it was ordinarily employed. Thus, for example, a usufructuary was not entitled to build upon land unbuilt on, or to alter the character of a building itself as by adding a wing, or dividing a room into new chambers, or throwing several rooms into one,[7] or converting a private dwelling-house into a shop or warehouse, or into stables, or into a public bath,[8] or converting a pleasure-garden into a market-garden or into a vineyard,[9] even although the subject might be thereby rendered more profitable. Further, the usufructuary was not entitled to subject the property to a use inferior to that for which it was ordinarily used or destined, as by putting a slave who was ordinarily engaged in literary

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[1] *Cf.* Justinian, *Inst.* ii. 4, 3; Gaius, *Inst.* ii. 30; Moyle, *Inst.*, 4th ed., 220.

[2] *Cf.* French Civil Code, Arts. 600-616.

[3] *Dig.* vii. 9, 1 pr.

[4] Justinian, *Inst.* ii. 1, 38.

[5] See *ante*, p. 262.

[6] Cf. *Dig.* vii. 1, 7, 2; vii. 1, 27, 3.

[7] *Dig.* vii. 1, 13, 7. But a usufructuary could let a building if it was not already let at the time when the usufruct was created.

[8] *Dig.* vii. 1, 13, 8.

[9] *Dig.* vii. 1, 13, 4.

or artistic work to menial drudgery.[1] A usufructuary was not even entitled to finish an unfinished house,[2] or put a roof upon bare walls;[3] he might open, but could not close, windows;[4] he had no right to erect buildings, except such as were actually required for his crops, or for the protection of the property, and the gathering of its fruits;[5] and he was not entitled to demolish any buildings,[6] even although they had been erected by himself.[7]

(d) *Termination of Usufruct*[8]

The right of usufruct might terminate in any of the following ways, namely:—

(1) *Death*, whether civil or natural, of the usufructuary.

In the time of Justinian civil death in the forms only of *capitis deminutio maxima* and *media*[9] had the effect of terminating a usufruct,[10] but under the older law it was also ended by the least loss of status (*c. d. minima*), such as adoption or arrogation.[11]

By the law of Justinian, although prior to that time the point had been the subject of much controversy among the jurists, a usufruct that had been acquired by a father through a *filiusfamilias*, or by a master through a slave, respectively, was not terminated by either the death or the *capitis deminutio* of the son, or by the death of the slave, but continued to subsist until the natural or the civil death of the father, or of the master, as the case might be; moreover, if a *filiusfamilias* through whom a usufruct had been acquired survived his *paterfamilias*, he himself continued to enjoy the right of usufruct in his turn until either his natural or his civil death.[12]

If a usufruct was one enjoyed by a corporate juristic body such as a municipality, the right ceased upon the expiry of one hundred years from the date of the grant—that period being regarded by the law as the extreme limit of human life,[13] and because a usufruct never extended

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[1] *Dig.* vii. 1, 15, 1.
[2] *Dig.* vii. 1, 61, 1.
[3] *Dig.* vii. 1, 44.
[4] *Dig.* vii. 1, 13, 7.
[5] *Dig.* vii. 1, 13, 6; vii. 1, 73.
[6] *Dig.* vii. 1, 13, 4.
[7] *Dig.* vii. 1, 15 pr. See Hunter, *Roman Law*, 4th ed., 400.
[8] See Justinian, *Inst.* ii. 4, 3. *Cf.* French Civil Code, Arts. 617-624.
[9] See on *Capitis deminutio*, *ante*, p. 72 *et seq.*
[10] *Code*, iii. 33, 16 pr., 1, 2.
[11] Paul, *Sent.* iii. 6, 29. *Cf.* Gaius, *Inst.* iii. 83.
[12] *Code*, iv. 33, 16, 17.
[13] *Dig.* xxxiii. 2, 8; vii. 4, 3; *Code*, iii. 33, 3.

beyond the life of the usufructuary, although it might be fixed for any period short of that—unless there was, in the grant itself, express provision otherwise.[1]

(2) *Expiry of the period for, or fulfilment of the condition upon which the right of usufruct was granted.*

A usufruct never extended beyond the life of the usufructuary, but it might terminate sooner, either by reason of a definite date of determination having been fixed in the grant, or by the happening of some event which was to have the effect of ending it, such as, for example, the attainment by a person of a certain age,[2] or the recovery by an individual, other than the usufructuary, of his sanity.[3]

The lapse of the period of one hundred years had, in the case of a corporate body, the effect above mentioned[4] of ending a right of usufruct enjoyed by it, unless the grant expressly provided otherwise.[5]

(3) *Consolidation* (*consolidatio*) or *Confusion* (*confusio*) had the effect of extinguishing a right of usufruct. This arose when the right of usufruct and the bare ownership (*nuda proprietas*) became merged in the same person.[6]

(4) The *cession* of the usufruct to the owner by the usufructuary ended the right.[7] But the right could not be ended by ceding it to anyone other than the owner of the property usufructed, for the right itself was personal to the usufructuary, and could not in any way be disposed of by him, although he might, gratuitously or onerously, permit another to exercise the right.[8]

(5) *Non-use* (*non utendo*).[9]—The failure on the part of the usufructuary to use his right in the proper way, and at the proper time had the effect of terminating the usufruct. By the law of Justinian, a usufruct was extinguished by non-use throughout the periods of ten and twenty years respectively, according as the owner of the property usufructed and the usufructuary respectively lived in the same or in different provinces.[10]

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[1] *Dig.* vii. 1, 56.

[2] Cf. *Code*, iii. 33, 12 pr. If the person died before attaining the age fixed, the usufruct nevertheless continued to subsist until the expiry of the specified time. *Cf.* French Civil Code, Art. 620.

[3] Cf. *Code*, iii. 33, 12, 1.

[4] See *supra*.

[5] *Dig.* vii. 1, 56.

[6] Justinian, *Inst.* ii. 4, 3.

[7] *Inst.* ii. 4, 3.

[8] See *ante*, p. 262.

[9] *Inst.* ii. 4, 3. See on non-use as extinctive of servitudes generally, *ante*, p. 252.

[10] *Code*, iii. 33, 16, 1 ; iii. 34, 13. By Justinian's legislation the usufructuary was placed so far in the position of an owner of a thing that it required the same length

(6) *Destruction* of the property usufructed, as by fire, or by earthquake, or through decay, extinguished the right.[1]

SECTION 92.—USE (USUS)[2]

This was a personal right of servitude similar to, but much less extensive than, usufruct. The personal servitude of "use" (*usus*) was, in the law of Justinian, a right to use property belonging to another person without in any way impairing the subject, and to enjoy the fruits or produce of the subject—such as vegetables, wood, fruit, flowers, hay, straw, or milk—only so far as might be necessary to meet the daily requirements of the user (*usuarius*) and his family or household.[3]

The right in the usuary to even a portion of the fruits of the subject was an extension accorded only by the later law, and operated through equitable juristic interpretation; for under the older law a user had right to only the "bare use" (*nudus usus*) of the subject, and was not entitled to take any of its produce. The usuary of a flock of sheep, for example, was not entitled to take any of the milk, or the lambs, or the wool, for these were their fruits, but he might make use of the animals to manure the land, and so render it more productive;[4] but it came to be recognised that the user might take so much of the milk as was necessary for his personal requirements, if to do so was not inconsistent with the terms of the grant.[5]

The user of a house was entitled to live in it with his wife and family and dependants and servants, and to receive guests in it, although previously it had been doubted whether the right of occupation was not confined strictly to the user himself.[6] The user was entitled to the whole use of the subject, and the owner could not demand the use of any part not used by him.[7] The right of use was indivisible, and could not be given partially to different persons;[8] but one person could have the use and another person the fruits of the same subject.[9] If the use of a house was given to a wife or to a husband,

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of time to make him lose the usufruct as it did to make the owner lose the property (Sandars, *Institutes of Justinian*, 129).

[1] Justinian, *Inst.* ii. 4, 3.

[2] Justinian, *Inst.* 2, 5; *Dig.* vii. 8.

[3] Justinian, *Inst.* ii. 5, 1.

[4] Justinian, *Inst.* ii. 5, 4; *Dig.* vii. 8, 12, 2.

[5] *Dig.*, *ut supra.*

[6] Justinian, *Inst.* ii. 5, 2; *Dig.* vii. 8, 2, 1; vii. 8, 4, 6, 8.

[7] *Dig.* vii. 8, 22, 1.

[8] *Dig.* vii. 8, 19.

[9] *Dig.* vii. 8, 4, 1; vii. 8, 9.

as the case might be, the other spouse was also entitled to enjoy the right.[1]

The right of use was specially distinguished from that of usufruct in respect that the right of exercise as well as the right itself was purely personal to the user; he could only exercise his right personally, and was not entitled to transfer the right of exercise to anyone else in any way, whether gratuitously or onerously.[2] The ground of this distinction and limitation was that the user had no more right to "civil" fruits of the subject (such as he would be taking if he were to let or to sell the exercise of his right to another person) than he had to the natural fruits or produce. It was only by means of equitable juristic interpretation that the grant of a right of use ultimately carried with it the right to take so much of certain kinds of produce of the subject as might suffice for the daily requirements of the user and his family.[3]

(a) *Constitution and Termination of Usus*

The personal servitude of use (*usus*) was created and ended in the same ways as usufruct,[4] and it might be granted either for the life of the grantee or for a lesser limited period.

SECTION 93.—HABITATION (HABITATIO)

This was the third of the personal servitudes recognised by the Roman Law. "Habitation" was a right to occupy and reside in a house belonging to another person without payment of rent or other consideration. Before Justinian it was considered doubtful whether habitation was in itself a distinct servitude, but Justinian expressly gave to it that character.[5] "Habitation" was originally, like "use" (*usus*), a purely personal right, but in the time of Justinian a grantee was entitled either to inhabit the house himself or to let it for occupation to another person.[6] A grant of the right of habitation was, under the older law, considered to be for one year only, but under the later law it was a grant for life, unless specially limited.[7]

The right of habitation was specially differentiated from both

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[1] *Dig.* vii. 8, 4, 1; vii. 8, 9.

[2] *Inst.* ii. 5, 1.

[3] Justinian, *Inst.* ii. 5, 1. See Sandars, *Institutes of Justinian*, 131.

[4] Justinian, *Inst.* ii. 5 pr. See *ante*, p. 261.

[5] *Inst.* ii. 5, 5; *Dig.* vii. 8, 10 pr.

[6] *Inst.*, *ibid.* *Cf.* a right of habitation with a right of use of a house. The user had no right to transfer his right or its enjoyment to another (*Inst.* ii. 5, 2).

[7] *Dig.* vii. 8, 10, 3.

usufruct and usus, in respect that it was not lost either by non-use (*non utendo*) or by *capitis deminutio minima*.[1]

Section 94.—Services of Slaves (Operae servorum) or of Animals (Operae animalium)

These two minor servitudes might be either combined or separate, and were sometimes conjoined with that of "habitation." They gave right to the services of the slaves, or of the animals belonging to another person;[2] and they were purely personal to the grantee, who was not entitled to transfer either the right or its exercise to another.[3]

The personal servitudes of "habitation," and "services of slaves" (*operae servorum*), and "services of animals" (*operae animalium*) might, like both the other personal servitudes of "usufruct" and "use," be created by agreement or by testament; but where a right to the services of slaves or of animals was given by testament (*testamento*) as a legacy, the right of enjoyment of the servitude did not end with the death of the legatee, but passed to his heirs, who, in their turn, continued to enjoy the right so long as the slaves or the animals lived.

Servitude rights to the services of slaves or of animals were specially distinguished from both usufruct and *usus*, in that they were not terminated by either non-use or, even before the time of Justinian, by *capitis deminutio minima*;[4] and whilst a usufruct of slaves, or of animals, only subsisted during the life of the usufructuary, the right to the services of slaves or of animals, as the case might be, continued throughout the lives of the objects of the right.[5]

Section 95.—Juristic Persons and Personal Servitudes

A personal servitude might competently be constituted in favour of, and pertain to, a "juristic" person, just as to a natural one, and a right so established was terminated either by the dissolution of the juristic person—which was regarded as equivalent to the death, natural or civil, of a natural person—or by the lapse of one hundred years from the time when the right was first granted, unless there was in the terms of the grant express provision otherwise.

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[1] *Dig.* vii. 8, 10 pr.
[2] *Dig.* vii. 7.
[3] Justinian, *Inst.* ii. 5, 3; *Dig.* vii. 8, 12, 5, 6.
[4] *Dig.* xxxiii. 2, 2; *Dig.* vii. 7, 2; vii. 8, 10 pr.
[5] *Dig.* xxxiii. 2, 2. *Cf.* Girard, *Droit Romain*, 5th ed., 370, 371.

CHAPTER IX

Rights other than Servitudes over the Property of Another Person which fell short of Ownership

The Roman Law recognised, besides servitudes, three other forms of rights over the property of another person (*jura in re aliena*), which were not so extensive as ownership (*dominium*), under the respective names of *Emphyteusis*, *Superficiis*, and *Pignus*.[1]

Section 96.—Emphyteusis

This was a form of contract by which, under the later Roman Law, an owner of land or of buildings[2] gave to another person, in respect of an annual return,[3] either in money or in produce, a real right in his property which entitled him to exercise practically full rights of ownership over it to the extent of enjoying all the fruits, and disposing of the estate (*praedium*), while the owner himself (*dominus*) retained only the bare ownership (*nudum dominium*). The grant of *emphyteusis* was usually, although not necessarily, in perpetuity,[4] and was subject to the condition that failing payment of the annual sum or other consideration, the right should be forfeited. The person receiving the grant of *emphyteusis* was known as the *emphyteuta*, and he was said to have the *jus emphyteuticarium*. It was for long a disputed point whether *emphyteusis* was a contract of sale or of lease;[5] in its origin it undoubtedly possessed the character of a lease, but as time progressed and its importance increased it became necessary to determine its exact character; the Emperor Zeno (A.D. 475-491), accordingly, declared *emphyteusis* to be in itself a distinct contract, with special characteristics of its own.[6]

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[1] *Pignus* will be found treated of in Part IV. under the "Law of Obligations," *voce* "Contracts, *Re*."

[2] *Nov.* 7, 3, 1, 2.

[3] The consideration was known as *pensio* or *canon*.

[4] *Dig.* vii. 3, 3.

[5] Gaius, *Inst.* iii. 145; Justinian, *Inst.* iii. 24, 3.

[6] Justinian, *Inst.* iii. 24, 3; *Dig.* vi. 3; *Code*, iv. 66, 1.

(a) *Rights and Duties of the Emphyteuta*

The grantee in *emphyteusis* did not acquire the absolute ownership of the property, for the "bare ownership" (*nudum dominium*) remained with the granter; but he received possession of the land, or other property, usually in perpetuity, and his right could not be interfered with by the true owner so long as the *emphyteuta* duly respected and performed the duties imposed upon him by the contract, to the effect that (*a*) the stipulated annual return was forthcoming;[1] (*b*) all taxes or other annual burdens were paid;[2] (*c*) the value of the property was not permanently deteriorated by the actings of the grantee, or by the use to which he put the property;[3] and (*d*) the *emphyteuta* duly recognised the rights of the owner when making an alienation of the property.[4]

The *emphyteuta* was liable to eviction if the annual return in respect of the property was in arrear for three years, or for two years if the owner of the land was a church, or a charitable foundation;[5] or if the taxes on the property were in arrear for three years;[5] or if he failed to perform the special duties incumbent upon him on alienation;[6] or if the operations of the grantee upon the property lessened its value and the owner was a church, or a charitable foundation.[7]

The grantee (*emphyteuta*) was entitled to possess and to have the complete use of the lands, and, having reaped them, to enjoy and consume the fruits;[8] he could make changes in the substance of the property, and might alter its character by such means as building, planting, reclaiming, draining, so long as the value of the property was not lessened by reason of such operations.

If the permanent value of the property was lessened by the actings of the *emphyteuta*, he was bound to indemnify the owner, and he might even be liable to eviction if the owner were a church or a charitable foundation,[9] but he was not himself entitled to claim compensation for improvements.[10]

The *emphyteuta* might burden the land, as by mortgage,[11] or by a servitude, for the period of the duration of his own right;[12] for his rights

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[1] *Code*, iv. 66, 1.
[2] Cf. *Nov.* 7, 3, 2; 120, 8; *Code*, iv. 66, 2; x. 16, 2.
[3] Cf. *Nov.* 7, 3; 120, 6, 8.
[4] *Code*, iv. 66, 3. See *post*, p. 271, for rights of the owner in such circumstances.
[5] *Code*, iv. 66, 2; *Nov.* 7, 3, 2.
[6] *Code*, iv. 66, 3.
[7] *Nov.* 120, 8. Such forfeiture was styled *privatio* or "deprivation."
[8] *Dig.* xxii. 1, 25, 1.
[9] *Nov.* 120, 8.
[10] *Code*, iv. 66, 2.
[11] *Dig.* xiii. 7, 16, 2.
[12] *Dig.* vii. 4, 1 pr.; xxx. 71, 5, 6; xliii. 18, 1, 9.

as such were heritable, and he enjoyed all the real remedies of an owner, in the form of *actiones utiles* for their protection.[1] His rights, moreover, were alienable both *inter vivos* and by testament, and he might sell them with the consent of the owner, or otherwise dispose of them; but if he did not transfer or dispose of his rights they descended to his heirs. When the *emphyteuta* sold his right the real owner had a right of pre-emption,[2] in virtue of which he was entitled to have the first opportunity of purchasing the property at the price offered for it, and he had also a right to a commission or fine, not exceeding two per cent., on the purchase price or value of the property on the occasion of every alienation by the *emphyteuta* to a third party.[3]

It will be observed that in all respects the rights of the *emphyteuta* were more extensive than those of a usufructuary; they resembled rather those of the *bonâ fide* possessor than those of a usufructuary, in respect that the *emphyteuta* was entitled to the fruits as soon as they were separated from the land, whether they had been gathered or not,[4] and the *emphyteuta* was, moreover, not bound, like the usufructuary, to deal with the property as a "good *paterfamilias*."[5] The *emphyteuta* had, further, a real right (*jus in rem*), whereas the usufructuary of land had only a personal right (*jus in personam*) available to him on eviction, merely to sue for compensation for breach of agreement to give peaceable possession, but not to bring an action in order to recover possession.

(b) *Creation and Termination of Emphyteusis*

Emphyteusis was created by agreement in writing,[6] by testament, and probably also by prescription upon the analogy of servitudes.[7] *Emphyteusis* was terminated by the mutual consent of the granter and grantee, by the destruction of the property, by the expiry of the period for which the right was granted, by consolidation or confusion, by prescriptive possession on the part of the true owner, by forfeiture, and by the death of the *emphyteuta* without lawful heirs.

Emphyteusis originated in the early Roman practice of the leasing out by the State of lands taken in war for fixed periods or in perpetuity, in return for a rent called *vectigal*, and lands so leased out were called *agri*

[1] *Dig.* vi. 3, 1, 1.
[2] See *Code*, iv. 66, 3.
[3] *Code*, iv. 66, 3.
[4] *Dig.* xxii. 1, 25, 1.
[5] *Nov.* 120, 8.
[6] *Code*, iv. 66 i.
[7] See Hunter, *Roman Law*, 428, and Mackenzie, *Roman Law*, 192, note 2.

vectigales or "vectigal lands."[1] Later on this special practice of letting out lands was adopted by corporate bodies, and it was ultimately applied to both the lands and houses of private individuals. In each case the tenure was usually as a lease in perpetuity. When this special form of tenure was applied to the lands and houses of private individuals property so leased was styled *praedia emphyteuticaria*, and the tenure itself was known as *emphyteusis*.[2] Thereafter the tenures and rights relating to the *agri vectigali* leased out by the State, and to the *praedia emphyteuticaria* let out by corporate bodies and private individuals, continued to subsist concurrently, until, in the time of Justinian, or shortly before, they were blended under the common name of *emphyteusis*.

Emphyteusis is historically important as a form of land tenure. Its most characteristic feature was the practically double ownership of the true owner (*dominus*), and of the grantee (*emphyteuta*) existing concurrently; this conception of dual ownership was reproduced and developed in Mediaeval Feudalism.[3]

SECTION 97.—SUPERFICIES[4]

This, as a form of right in the property of another person (*jus in re aliena*), signified a real right granted by the owner of land to another person over a building erected by the grantee upon a certain area or extent of the surface (*superficies*) of the granter's land in consideration of a stipulated annual return,[5] or for a definite price, and in respect of which the grantee was entitled to use and enjoy,[6] and to dispose of or burden[7] the building so long as he did not destroy it, the granter's ownership of the soil remaining all the time unaffected.[8]

A grant of superficies was usually, like *emphyteusis*, in perpetuity, or for a long term; it was, in effect, a perpetual or a very extended lease of land for building purposes.

The right of superficies[9] was constituted, transferred, and extinguished in the same ways as was *emphyteusis*.

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[1] See Gaius, *Inst.* iii. 145.

[2] The name *emphyteusis* (ἐν φυτεύω) connoted the idea of what, in effect, amounted to another ownership being grafted upon the real *dominium* (Sandars, *Institutes of Justinian*, 134).

[3] See on *Emphyteusis*, Moyle, *Inst.*, 4th ed., 323-325; Poste, *Institutes of Gaius*, 4th ed., 372; Hunter, *Roman Law*, 4th ed., 420 *et seq.*; Sandars, *Institutes of Justinian*, 134, 135; Mackenzie, *Roman Law*, 7th ed., 191-193; Muirhead, *Roman Law*, 2nd ed., 392-394; Sohm, *Institutes of Roman Law*, 3rd ed., 348-350; Girard, *Manuel de Droit Romain*, 5th ed., 386, 387.

[4] *Dig.* xliii. 18.

[5] This return was known as either *pensio* or *solarium*.

[6] *Dig.* xliii. 18, 1, 1; xliii. 18, 1, 6.

[7] *Dig.* xliii. 18, 1, 7; xliii. 18, 1, 9; xx. 4, 15.

[8] *Dig.* vi. 1, 74; vi. 1, 73, 1; xliii. 18 2

[9] *Jus superficiarium*.

The right of the grantee in superficies, *i.e.* the "superficiary" (*superficiarius*) was heritable, and he might dispose of his right either *inter vivos* or by testament; he might also burden it, as with a pledge or with a servitude, but if he did not dispose of his right it descended to his heirs.

The effect of a grant of superficies was that, while the building erected upon the area of surface (*superficies*) over which the right had been granted became, necessarily, by accession the property of the owner of the soil on which it stood, the grantee or "superficiary" obtained, at the same time, a real right to the full possession and enjoyment of the building, and his rights were protected by a "real" action and by the possessory interdicts generally.[1]

The rights of superficies and of *emphyteusis* closely resemble each other, the main distinction between them being merely that superficies related only to the surface and to things built upon the surface of the land, whereas *emphyteusis* related to the land itself. The legal position of the "superficiary" was the same as that of the *emphyteuta;* they had the same legal remedies in the form of real actions and protected possession, and they both were entitled to the juristic possession of the land to the exclusion of the true owner as contrasted with the juristic possession of a servitude right which is not exclusive of the right of the owner of the land.[2]

The "superficiary," in virtue of his real right, was entitled to take and use the fruits or profits of the building, and to pledge it or otherwise burden it, or to alienate it to the same effect as an *emphyteuta.*

The principal duty of the superficiary was, like the *emphyteuta,* to pay the stipulated annual return, as well as to refrain from so using the property as to seriously depreciate its value, and he was not bound to show the care of a *bonus paterfamilias.*

Superficies is supposed to have originated in the Praetorian law at a time prior to that when buildings could competently be the subject of *emphyteusis.*[3]

[1] See *ante,* p. 209, and p. 211, note 2.

[2] *Cf.* Sohm, *Inst.,* 3rd ed., 350, 351.

[3] See on "Superficies," in addition to the authorities cited on "Emphyteusis" (*ante,* p. 272, note 3), Cuq, *Institutions Juridiques des Romains,* ii. 297-301.

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PART IV

THE LAW RELATING TO OBLIGATIONS[1]

CHAPTER I

OBLIGATIONS GENERALLY[2]

SECTION 98.—GENERAL NATURE OF AN OBLIGATION

AN "obligation" (*obligatio*) is defined in the *Institutes* of Justinian as "a bond of the law" (*vinculum juris*) in respect of which persons are compelled to do something in conformity with the law of the State.[3]

Legal obligations may be created either by the mutual consent of persons, or by the law itself, apart from and irrespective of the wishes or the consent of parties. A legal obligation, therefore, may be defined more fully as a bond (*vinculum*) created by the law which unites persons together in certain relations, either with or without their consent, to the effect that one person is bound either to do, or to refrain from doing, some act for the benefit of another person.[4]

The term employed in the Roman Law to signify performance of a legal obligation was *solutio;* and "solution" of an obligation involved all that a person was bound (*obligatus*) to do, or to refrain from doing, for the benefit of the other person.[5]

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[1] See Justinian, *Inst.* iii. 13-24, and iv. 1-5; Gaius, *Inst.* iii. 88-225; *Dig.* xliv. 7. In book iii. of the *Institutes*, obligations are considered in so far as they are created by contract, while in book iv. they are treated of in respect of arising out of delict or wrongdoing.

[2] See on obligations generally, Moyle, *Institutes of Justinian*, 4th ed., 474-482; Poste, *Institutes of Gaius*, 4th ed., 315-322; Hunter, *Roman Law*, 4th ed., 451-458; Buckland, *Principles of Roman Private Law*, ch. vi.; Muirhead, *Roman Law*, 2nd ed., ss. 31, 39, and 53; Sohm, *Institutes of Roman Law*, 3rd ed., part ii., bk. ii., ch. iii., 358 *et seq.*; Girard, *Manuel de Droit Romain*, 5th ed., bk. iii., ch. iv., 388 *et seq.*; Cuq, *Institutions Juridiques des Romains*, bk. iv. (vol. ii.) 319; May, *Éléments de Droit Romain*, 8th ed., 229-237.

[3] *Cf.* Justinian, *Inst.* iii. 13, pr.: *Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura.* (*Cf.* also *Dig.* xliv. 7, 3 pr.).

[4] Cf. *Dig.* l. 16, 11, 12.

[5] Just as *solutio* signified "performance" of an obligation, the word *solvere* meant "to perform" or to give effect to the legal bond (*vinculum juris*). The term *solvere* included three different ideas (connoting the particular object of the obligation) signified respectively by the words *dare*, *facere*, and *praestare* (*cf.* Paul, *Dig.* xliv. 7,

An *obligatio* was the correlative of a right *in personam;* the *obligatio* was the duty that corresponded to the right (*jus*).

The law of obligations is concerned with rights created against particular persons, as contrasted with the law of things or property, which deals with rights available against everybody, and not merely special individuals; the distinction is, in other words, between "personal" rights (*jura in personam*) and "real" rights (*jura in rem*).[1]

An *obligatio*, or a right *in personam* created by contract, was, in the Roman system, in striking contrast to a right *in rem* which was created and existed in virtue of the fact of conveyance and ownership. Ownership gives rise to rights available against everybody, or, as it is usually expressed, "against all the world," which entitles the person in right of it to claim from all persons either acts or forbearances with respect to certain property by reason of the fact that it is already his own to the exclusion of everybody else.

A contractual obligation, on the other hand, creates merely a right *in personam*, or one against a particular person only, which entitles the person in right of the obligation to claim on the part of the person bound alone either the performance of, or the abstention from, a particular act. The distinction between rights of ownership and contractual rights has been expressed by the jurist Paul to the effect that the essence of an obligation is not that it creates rights over property (*in rem*), but that it merely binds other persons either to give something to us, or to do something for us.[2]

A legal obligation creates the relation of creditor (*creditor*) and debtor (*debitor*).

The *creditor* is the person who can compel, by legal process, the performance of the obligation; and the debtor (*debitor*) is the person who can be legally compelled to perform the obligation.[3]

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3 pr.), or otherwise "to give," "to do," and "to make good." *Dare* signified to *give* either the property in or the possession of a thing; *facere* meant, strictly, to *do* some particular act undertaken, and *praestare* had the special meaning of *to make good* or to compensate for some fault (*culpa*) that had been committed. The distinction between the terms, however, was not strictly adhered to: *dare* is frequently employed as a generic term embracing both *facere* and *praestare*. According to Moyle (*Institutes of Justinian*, 4th ed., 475) this classification of the objects of obligation was, in the time of Justinian, "a mere valueless survival of an older and obsolete procedure," unscientific in character, and having its origin in the technicalities of the formulary procedure. Moreover, the precise meaning to be attached to each of the terms is so disputed that it is futile to attempt to determine their exact signification.

See on the signification of the terms *dare*, *facere*, and *praestare*, Hunter, *Roman Law*, 453.

[1] See on "real" and "personal" rights, *ante*, Part III., Section 69, p. 212.

[2] *Dig.* xliv. 7, 3 pr.

[3] *Dig.* l. 16, 108; l. 16, 10; l. 16, 11; v. 1, 20.

The right of the creditor against the debtor is the *jus in personam*, and the "obligation" (*obligatio*) is the correlative duty imposed upon the debtor (*debitor*) in respect of the creditor's right.

The word *obligatio* is used in the Roman Law in a variety of senses. In a general sense it is employed to signify the legal bond between a creditor and a debtor, in which sense it applies equally to both parties; but it is also found with particular meanings, as signifying (*a*) the creditor's right alone;[1] (*b*) the debtor's duty only in respect of the bond;[2] (*c*) the mode in which the relation is created, in which sense it is practically equivalent to "contract" (*contractus*); (*d*) the document or deed by which the debt is constituted;[3] and (*e*) the object of the obligation, such as a thing pledged.[4]

In modern times, however, the term *obligatio* is ordinarily used with reference to the debtor only, and the creditor's interest is referred to as the *jus* or right to which the *obligatio* or duty of the debtor is correlative.[5]

All obligations are reducible to a twofold classification of either (*a*) acts, or (*b*) forbearances, but the Roman Law required that, in all cases, the duty imposed upon the debtor, whether it were one of doing or of not doing, should be capable of estimation in pecuniary terms,[6] as an equivalent to non-performance.

The rationale of this rule was that obligation neither implied nor involved any control over the person or the acts of the debtor, as did the paternal power (*patria potestas*) and the dominical authority (*dominica potestas*), and the creditor could not, at his own hand, compel the debtor to fulfil the obligation, but in order to get satisfaction required to invoke the aid of the State through the Courts to obtain a monetary equivalent to performance if the debtor failed to perform. "An obligation means a deduction, not from a man's liberty, but only from his property," for, in the last resort, a debtor can always rid himself of every obligation by sacrificing a corresponding portion of his property in order to indemnify the other person.[7]

It follows from the definition of an obligation that it is the law

[1] *Inst.* iii. 28; *Dig.* xii. 2, 9, 3; xxiii. 3, 46 pr.; xlv. 1, 126, 2.

[2] *Dig.* l. 16, 21.

[3] Cf. *Code*, iv. 30, 7.

[4] Cf. *Dig.* xx. 6, 11.

[5] In the English language the term *obligatio* applies exclusively to the debtor (Hunter, *Roman Law*, 4th ed., 454).

[6] *Dig.* xl. 7, 9, 2.

[7] Sohm, *Institutes of Roman Law*, 3rd ed., 359. See also on this point, Poste, *Institutes of Gaius*, 4th ed., 317; Cuq, *Institutions Juridiques des Romains*, ii. 319; and Moyle, *Institutes of Justinian*, 4th ed., 476. Moyle's view is that this rule originated in the fact that under the formulary system the remedy in a personal action was always damages, as there was neither then, nor subsequently, introduced specific performance, although some writers maintain the contrary.

itself which fastens the legal bond, and similarly, it is the law that unloosens the bond by prescribing what is necessary in order to constitute "solution" or legal performance of the obligation. As soon as an obligation has been created or undertaken, the law thereupon supplies the "sanction" or element of compulsion, to the effect that neither party can thereafter please himself as to whether or not he will perform his part, for the law will compel him to do so by mulcting him in pecuniary damages for his failure.

SECTION 99.—GENERAL DIVISION OF OBLIGATIONS

The Roman Law divided obligations into two general classes—namely, (1), those enforceable by action at law, and (2) those not enforceable by action.

Obligations enforceable by action are classified in the *Institutes* of Justinian in a twofold manner—namely, (1), according to the source from which they derive their authority into either (*a*) "civil," or (*b*) Praetorian;[1] and (2) according to their juristic source, as they arose from either contract or delict, or their analogues.[2]

> Stated another way, obligations enforceable by action were so on account of either (*a*) the authority from which they derived their binding effect—*e.g.* the *jus civile*, express enactment, or the *jus honorarium;* or (*b*) their juristic source—*i.e.* according as they arose from contract, or from circumstances analogous to contract, or from delict or from circumstances resembling wilful wrongdoing.[3]

An obligation that could not be enforced by an action at law was styled a "natural" one (*naturalis obligatio*) as being one imposed by natural equity in contrast to one imposed and enforced by the civil law, and as such it was referred to as *vinculum aequitatis*, or an equitable bond.[4]

SECTION 100.—CIVIL AND PRAETORIAN OBLIGATIONS

A "civil" as contrasted with a "praetorian" obligation was one which was based either upon the strict *jus civile*, or upon express statutory enactment, and which could, in general, be enforced by a form of action under the older Roman Law. The forms of action provided by the strict *jus civile* were very few in number and unadaptable in form and character, and the obligations to which they gave effect

[1] Justinian, *Inst.* iii. 13, 1; *Dig.* xliv. 7, 52 pr., 5, 6.

[2] Justinian, *Inst.* iii. 13, 2; Gaius, *Inst.* iii. 88, 89; *Dig.* xliv. 7, 1 pr., 1. See as to Justinian's classification and its scientific character or otherwise, Buckland, *Principles of Roman Law*, 288, s. 103; also Moyle, *Inst.* 390.

[3] *I.e.* according as the obligation arose *ex contractu*, *quasi ex contractu*, *ex delicto*, or *quasi ex delicto;* see *post*, Chapters II., III., IV.

[4] *Dig.* xlvi. 3, 95, 4. See "*jus naturale*" and "*jus civile*," *ante*, Part I., Chapter II., Section 4, p. 57.

derived their binding character as such from the exact use of particular forms and words at the time of the transaction. From this fact there came to arise the distinction between "civil" and "praetorian" obligations.

A "praetorian" obligation was one that was neither recognised nor enforced by the forms of the older *jus civile*, or by statutory enactment, but which received its sanction and enforceability from the Edicts of the magistrates (*edicta magistratum*),[1] and especially from the edict of the Praetor[2] in the exercise of his equitable discretion, or, in the later Roman Law, from the authority of the Emperor, and for which special forms of action were provided, adapted to the particular circumstances of each case.

"Praetorian" obligations formed part of what was styled the *jus honorarium* or equitable law grafted upon the older *jus civile*, and for that reason they were sometimes referred to as "honorary obligations" (*honorariae obligationes*).[3] Although "civil" and "praetorian" obligations were thus distinguished from each other they possessed the common element of enforceability by action at law, although by different forms of process, and although each was based upon a different source of authority.[4]

> The actions by which "civil" and "praetorian" obligations were respectively enforced were known as "condictions" (*condictio*) and actions *bonae fidei*, and this distinction between the forms of action corresponded to the distinction between the forms of obligation. "Condictions" as derived from the *jus civile* were *stricti juris*, the judge being confined strictly to the letter of the law, and not permitted any latitude in arriving at his decision. In the case of *bonae fidei* actions or those arising out of obligations based upon good faith and intention of parties the judge was entitled to take into account equitable considerations according to the circumstances of each case and to give judgment accordingly.

SECTION 101.—NATURAL OBLIGATIONS[5]

A "natural" obligation was one which, while possessing the qualities of a legal obligation, was, nevertheless, not enforceable by action. A

[1] See "Historical Introduction," Part I., p. 23.

[2] See Part I., Section V., p. 24.

[3] See upon the *jus honorarium* and the origin of the term, *ante*, Part I., p. 27.

[4] There was a further distinction between "civil" and "praetorian" obligations with regard to their prescription or extinction by lapse of time. A "civil" obligation could not, originally, be extinguished by lapse of time, whereas a "praetorian" obligation could not, as a rule, be enforced after the lapse of a year from its origination (*Dig.* xliv. 7, 35 pr.).

[5] See on natural obligations, Girard, *Manuel de Droit Romain*, 5th ed., 639-644; Poste, *Institutes of Gaius*, 4th ed., 317, 318; Moyle, *Institutes of Justinian*, 4th ed., 476-479; Hunter, *Roman Law*, 4th ed., 454, 455; Buckland, *Principles of Roman Private Law*, 293.

"natural" obligation was considered by the Roman Law to exist in those cases where a person was bound by the "law of nature," or, in other words, was morally bound to another, but not civilly so related to the effect of enabling him to enforce the obligation by legal process.

An obligation might be "natural" as opposed to both "civil" and "praetorian," either because of (*a*) some defect (such as the absence of an essential formality) in the form of the contract constituting the obligation, or (*b*) defective status or legal capacity in the parties to the obligation.

The incapacity giving rise to a "natural" instead of a "civil" obligation might be either relative or absolute; an example of the former would be an agreement between a *paterfamilias* and anyone in his power, while an instance of the latter would be an undertaking by a slave to do something. So long as he was a slave he could not validly bind himself, but if he became free he was under a natural obligation to perform what he had undertaken, although he could not be legally compelled to do so.[1]

> Slaves were sometimes manumitted on the strength of a preceding agreement with their masters that, on manumission, they would give something to or do something for him; but it came to be usual, in order to obviate the risk of the repudiation of the natural obligation so created, that a formal stipulation by the slave should immediately succeed the ceremony of manumission as part of the same act, the two processes taking place *unico contextu*, or as parts of one and the same transaction.

Although a natural obligation was not enforceable directly by an action at law, this defect was largely counterbalanced by certain well-recognised legal effects of such an obligation; for a natural obligation might be pleaded or employed by way of a defence or "exception" (*exceptio*) to a direct action, and it might form the foundation for an accessory agreement that was itself enforceable by action.[2] Thus the restoration of money paid voluntarily in respect of a natural obligation could not be afterwards sued for by the debtor—under the action known as a *condictio indebiti*, or "the action for money not owing" —on the ground that the money had never been legally due, although the debtor could not have been compelled to pay.[3] A "natural" obligation could also be usually, but not always, employed[4] as a set-off against an actionable debt,[5] or as the foundation of an accessory

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[1] *Cf. Dig.* xliv. 7, 14.
[2] Justinian, *Inst.* iii. 20, 1.
[3] *Dig.* xii. 6, 19 pr.
[4] See Buckland, *ut supra*, p. 294.
[5] *Dig.* xvi. 2, 6.

contract,[1] such as suretyship,[2] or as the foundation of a new debt by "novation" (*novatio*), or to fortify a mortgage or a pledge.

Obligations were divided in the Roman Law, as has been already stated, into two great classes—namely, (1) those enforceable and (2) those not enforceable by action. Justinian further specially divided obligations, not only according to the authority, whether "civil" or "praetorian," from which they derived their binding character, but also, according to their juristic source, into obligations arising out of (*a*) express agreement (*ex contractu*); (*b*) circumstances resembling express agreement (*quasi ex contractu*); (*c*) wilful wrongdoing (*ex delicto*); and (*d*) circumstances analogous to wilful wrongdoing (*quasi ex delicto*).[3]

> It will thus be seen that the main sources of obligations and of rights *in personam*, according to the Justinianian law, were two in number—namely, (1) contract, and (2) delict; a person is legally bound (*obligatus*) to another either because (*a*) he has consented to be bound, or (*b*) he has done an injury to another, either in his property or in his person, and must consequently make good or give compensation for his wrongdoing (*delictum*). This division, however, which by itself is that of Gaius,[4] does not include all obligations enforceable by action; and Justinian adds two supplementary classes—namely, (*a*) obligations resembling those based on agreement (*quasi ex contractu*), and (*b*) obligations resembling those founded on delict (*quasi ex delicto*);[5] for it is obvious that some obligations are created merely by a state of facts or circumstances by which a person, without any express agreement, is placed in a position resembling that in which he would have placed himself if he had specifically agreed or contracted. Moreover, the particular wrongful acts (*delicta*) that gave rise to an obligation *ex delicto* were very few in number and precise in character, and the wrong actually done might be of such a character as did not bring it within the category of recognised delicts, in which cases an obligation arose *quasi ex delicto* in respect of the circumstances resembling those which would give rise to a delictual liability in the limited sense recognised by the Roman Law.[6]

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[1] An "accessory" contract is a subsidiary or secondary one entered into in order to fortify an already existing obligation, whether "civil" or "natural." In the latter case the accessory contract, such as suretyship if created by either *fidejussio* or *constitutum*, was itself enforceable by action, although the principal obligation was not.

[2] Justinian, *Inst.* iii. 20, 1; Gaius, *Inst.* iii. 119; *Dig.* xlvi. 1, 8, 1, 2; xlvi. 1, 70, 3. But this was not competent in the case of a loan contrary to the *S.-C. Macedonianum*, unless for some reason the surety had no right to demand indemnity from the principal, for that would have been to make the *filiusfamilias* liable indirectly, which was what the enactment sought to prevent (*cf.* Buckland, p. 294). (*Re* the *S.-C. Macedonianum* see the *Contract of Mutuum*, *post*, p. 336).

[3] Justinian, *Inst.* iii. 13, 2. See, for a criticism of this fourfold classification by Justinian, Moyle, *ut supra*, 390; also Roby, *Roman Private Law*, ii. ch. i.

[4] Gaius, *Inst.* iii. 88.

[5] *Cf.* Poste, *Institutes of Gaius*, 4th ed., 318, 319.

[6] See "Delicts," *post*, Chapter XI., p. 420.

This fourfold classification of obligations made by Justinian, although, indeed, more extensive than the twofold division of Gaius,[1] is not itself complete, for it does not include certain informal agreements or "pacts" (*pacta*) which, under the later law, were rendered enforceable by action either by the sanction of the Praetor's edict or by Imperial enactment,[2] but which did not technically fall within the recognised classes of contracts, whether "nominate" or "innominate."[3]

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[1] *Inst.* iii. 88.

[2] These were known as *pacta vestita* (see *post*, p. 292).

[3] On "innominate" contracts, see *post*, p. 299.

CHAPTER II

Obligations arising out of Express Agreement (Ex contractu) in General

In the Roman Law the terms "obligation" (*obligatio*) and "contract" (*contractus*) are not co-extensive. Contract is truly a form of obligation that is created by the special fact of consent of parties, whereas an obligation may be created by mere operation of law alone irrespective altogether of the wishes and consent of parties. The term "obligation" is thus much wider than "contract," although they both give rise to rights *in personam*.

A "contract" in a general sense, may be defined as an agreement (*conventio, pactio, pactum*) between two or more persons[1] which the law will enforce regarding a particular matter in which they are concerned, by which one person voluntarily undertakes a duty or duties with the intention of thereby creating in favour of another person rights against himself personally.[2]

A "contract" is thus an "accord of wills," effected by an offer (*pollicitatio*) on the one hand, and an acceptance of the offer on the other hand, to which is added the legal bond (*vinculum juris*) that creates the obligation. In order, however, that the agreement should have legal sanction it was necessary, according to the strict Roman Law, that the accord of wills should have been expressed in a particular way, which constituted the *causa civilis* or legal ground of the obligation under the strict *jus civile*. A contract was thus in the strict theory of the Roman Law an agreement effected by means of the two elements of offer and acceptance, to which there has been added a recognised legal ground of obligation (*causa civilis*); such were, under the earlier law, the *nexum* and the "stipulation."

The *nexum* was the solemn conveyance "by the copper and scales" (*per aes et libram*) and was the earliest Roman conception of obligation, and the principal, if not indeed the only form of contract recognised by

[1] Cf. *Dig.* ii. 14, 1, 2: *Et est pactio duorum pluriumve in idem placitum et consensus.*

[2] *Cf.* Mackenzie, *Roman Law*, 7th ed., 204.

the early law.[1] The *stipulatio* was a formal unilateral contract, in which the obligation was originally created by the employment of a particular form of solemn verbal question and answer; but the necessity for the use of a strict form of words was ultimately dispensed with by a Constitution of the Emperor Leo in 472 A.D.,[2] and thereafter a "stipulation" was binding as a "verbal"[3] contract whatever words might be employed, provided that the words were used in the form of question and answer, and that they sufficiently expressed the intention of the parties. The *stipulatio* succeeded the *nexum*, under the name of *sponsio*, when the latter went out of use after the Poetilian law (326 B.C.).[4]

In course of time the law gradually recognised other grounds upon which an enforceable legal obligation might be based, and other forms in which contracts could be made—namely, (*a*) by entry in a ledger or account book (*litteris*)[5]; (*b*) by simple delivery of a thing (*re*) in one or other of four ways styled respectively *mutuum*,[6] *commodatum*,[7] *depositum*,[8] and *pignus*,[9] unaccompanied by any special formalities; and (*c*) by mere consent of parties (*consensu*),[10] as in the contracts of sale (*emptio-venditio*), letting on hire (*locatio-conductio*), partnership (*societas*) and mandate (*mandatum*), also, like contracts *re*, unattended by any special formalities, so long as, in the forms and words employed, the intentions of the parties were sufficiently clearly expressed.

The ten forms of contract comprised under the respective categories *verbis* ("verbal"),[11] *litteris* ("literal"),[12] *re* ("real"),[13] and *consensu* ("consensual"),[14] constituted the recognised "nominate" or "named" enforceable contracts, under the Justinianian law.

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[1] In the language of the early *jus civile*, *nexum* signified any money transaction affected by the copper and scales, the effect of which was to *bind*, or to create liability. In a narrow sense *nexum* was a loan of money, just as a *mancipatio* was a sale and conveyance of property, effected by the solemn procedure *per aes et libram*. In the early period of Roman legal history we find all private dealings between individuals governed by the two juristic acts of *mancipatio* (or *mancipium*) and *nexum*. *Cf.* Sohm, *Institutes of Roman Law*, 3rd ed., 48-50. See also "Mancipatio," *ante*, Part III., Section 70, p. 214.

[2] *Code*, viii. 37, 10.

[3] See *post*, p. 295, on "verbal" contracts.

[4] See on the Stipulation, Muirhead, *Roman Law*, 2nd ed., 213-219, and 256-258.

[5] On "literal" contracts, see *post*, p. 296.

[6] See *post*, p. 334.

[7] See *post*, p. 338.

[8] See *post*, p. 342.

[9] See *post*, p. 348.

[10] See on the "consensual" contracts, *post*, p. 364 *et seq.*

[11] See "verbal" contracts, *post*, p. 295.

[12] See "literal" contracts, *post*, p. 296.

[13] See "real" contracts, *post*, p. 333 *et seq.*

[14] See "consensual" contracts, *post*, p. 364 *et seq.*

A contract may be either (*a*) unilateral or (*b*) bilateral[1] according as the obligation created by it binds only one of the parties, or both parties mutually; in the former case there is only one debtor who is the party bound by the obligation, while in the latter case both parties are, in turn, debtor and creditor.[2]

> Thus, as will be observed when they come to be particularly considered, the Roman "nominate" contracts *verbis* ("verbal") and *litteris* ("literal") and the "real" contract of *mutuum* were unilateral; while the other contracts made *re*, namely, *commodatum*, *depositum*, and *pignus*, were bilateral in so far that there was upon the party to whom the property was delivered, and who primarily derived the benefit under the contract, a right to claim from the other party exceptional expenses incurred in the maintenance, or for the preservation of the property, or incurred by him by reason of the fault (*culpa*) of the other party to the contract. In much the same sense the consensual contract of *mandate* was bilateral; and the other nominate consensual contracts were essentially and always bilateral.[3]

It was not every agreement (*conventio, pactio, pactum*) that constituted a contract. The Roman Law originally and for long used the term *contractus* in a narrow and special sense to signify only those agreements or conventions that were specially recognised and enforceable by forms of action under the strict *jus civile*, or by statute, and all other agreements not so recognised and enforceable were known as "pacts" (*pacta*). A "pact" (*pactum*) was thus a mere promise or informal agreement that did not, from its nature, fall within any of the categories of the recognised enforceable agreements, whether "nominate" or "innominate,"[4] and could not therefore form the basis of an action at law; it created, however, a "natural" obligation, which might in certain circumstances constitute a defence or "exception" (*exceptio*) to an action at law.[5]

Thus an enforceable contractual obligation might be modified by a subsequent informal agreement not to sue upon it, either not at all, or before or after a certain time, or unless a certain condition were fulfilled, and the informal agreement could be pleaded by way of defence to an action upon the principal obligation.[6]

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[1] French, *synallagmatique*.

[2] *Cf.* Poste, *Institutes of Gaius*, 4th ed., 320, 321.

[3] See Sandars, *Institutes of Justinian*, 8th ed., 322; also Poste, *ut sup.*

[4] See, on "Innominate Contracts," *post*, Section 103, p. 299.

[5] *Dig.* ii. 14, 7, 4: *Nuda pactio obligationem non parit, sed parit exceptionem.* On "Exceptions," see Justinian, *Inst.* iv. 13.

[6] *Cf.* Justinian, *Inst.* iv. 13, 3.

A "natural" obligation, however, might arise and be pleaded by way of a defence to an action in cases where it had been created without even the medium of a pact, because of the legal incapacity of parties to bind themselves; thus a slave might promise something but he could not legally bind himself; if, however, he became free, and thereby acquired legal capacity, the promise thereupon assumed the character of a natural obligation, in respect of which performance was naturally due.[1]

Some pacts came in course of time to be enforceable by an action either with the sanction of the Praetorian law or by express Imperial enactment; such were styled by the commentators *pacta vestita*, in respect of being by that means "clothed"[2] (*vestita*) with an action to enforce them, and all other informal conventions not so fortified were distinguished by the style of *nuda pacta* or "bare agreements," which were only available by way of defence to an action.[3]

In later times the term *contractus* came to be employed in the Roman Law in the general sense of any agreement enforceable by law whether its enforceability was based upon the *jus civile*, or upon the Praetorian law, or upon Imperial sanction. A "contract" (*contractus*) having been thus ultimately resolved into the definition of any agreement enforceable by the law, it will be understood that it involves two essential elements—namely, (1) the agreement of parties (*conventio*) or "accord of wills," and (2) the legal bond (*vinculum juris*) that attaches enforceability to the agreement.

SECTION 102.—PACTA VESTITA[4]

The "pacts" to which legal enforceability was attached, whether by the *jus civile*, the Praetorian law, or by Imperial enactment, fall into three categories known respectively as *pacta adjecta*, *pacta praetoria*, and *pacta legitima*.[5]

(a) *Pacta adjecta*, or "added pacts," were collateral agreements added (*adjecta*), or accessory, or secondary to a principal *bonâ fide* transaction. Thus it might be agreed between parties in a contract of sale that the seller was to be entitled to rescind the sale if he should receive a better

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[1] Cf. *Dig.* 44, 7, 14.

[2] *Cf.* Hunter, *Roman Law*, 4th ed., 549.

[3] *Dig.* ii. 14, 7, 4: *Nuda pactio obligationem non parit, sed parit exceptionem.*

[4] This is a term applied by the commentators.

[5] See on "Pacts" generally, Hunter, *Roman Law*, 4th ed., 545-550.

offer within a fixed time; or the purchaser of property might agree to subsequently lease it to the seller at a fixed rent.[1]

According to the classical law, *pacta adjecta*, if added at the same time as the principal contract was made, were truly a part of the contract itself,[2] and were enforceable by the same form of action as was competent to enforce the principal contract, but if they were made subsequent to the principal agreement (*ex intervallo*), although they might materially modify the terms of the contract, or even end it, they were only available by way of "exception" or defence to an action for performance of the obligation under the principal contract.[3]

(b) *Pacta Praetoria.* — "Praetorian pacts" were informal agreements that had received legal sanction and were rendered enforceable by action at law through the Edict of the Praetor. The chief examples of such pacts were *hypotheca*, *constitutum*, and *receptum argentariorum*.

Hypotheca, or "mortgage," was an agreement by a debtor that certain of his property, although remaining in his own possession, and subject to his own control, should be a security to his creditor for his debt, and that he should thereby acquire a real right (*jus in re*) in such property.[4]

Constitutum, or the *pactum de constituto*, was an informal agreement to discharge a debt, either of oneself or of another person, or to give security for its performance on a fixed date, in consideration of the creditor not suing upon the obligation.

This pact was originally only applicable to money debts, but was ultimately extended by Justinian to agreements relating to all kinds of property, and it was enforceable by the *actio de pecunia constituta*.[5]

Receptum Argentariorum.—This was a pact or informal agreement by which a banker (*argentarius*) undertook to discharge a customer's obligation in respect of either having or being about to have in his hands in ordinary course of business property of whatever kind belonging to the customer.

Such an agreement was originally enforceable by the *actio recepticia*, but when Justinian merged the two actions *de pecunia constituta* and

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[1] Cf. *Dig.* xviii. 1, 75.

[2] *Dig.* ii. 14, 7, 5.

[3] These rules only applied to contracts *bonâ fidei*. The rules applicable to the contracts *stricti juris*, viz. *stipulatio*, *expensilatio*, and *mutuum*, were somewhat different (see Hunter, *ut supra*, 549).

[4] See "Hypothec," *post*, Section 118, p. 351 *et seq.*

[5] See, on *Constitutum*, Justinian, *Inst.* iv. 6, 8-9; *Dig.* xiii. 5; Hunter, *Roman Law*, 4th ed., 566-568; Roby, *Roman Private Law*, ii. 86-88; Moyle, *Institutes of Justinian*, 4th ed., 426.

recepticia,[1] the rules relating to the former action were amended so as to extend to all cases to which the latter had applied, and to include the latter's special advantages.[2]

(c) *Pacta Legitima.*—These were certain informal agreements which were rendered legally enforceable by special Imperial enactment. Such were the *pactum de constituenda dote*, or a mere promise to give a dowry, and the *pactum donationis*, or a mere promise to make a gift.

The Emperors Theodosius and Valentinian enacted, in 428 A.D., that a mere agreement (*pactum*) to give a dowry should constitute a binding and enforceable obligation, although unfortified by a "stipulation";[3] and Justinian declared that a mere promise to make a gift was to bind not only the promiser but his heirs, and could be enforced even by the heirs of the donee.[4]

Prior to this enactment of Justinian it was necessary in order to give legal validity to an agreement that did not involve a valuable consideration that it should either have been expressed in a solemn form—such as *nexum*, *expensilatio*, or *stipulatio*—or have been performed by one of the parties. "Justinian put a promise to give a thing gratuitously upon the same footing as if a price had been agreed upon," and "by giving an action to support a mere informal promise of a gift, departed from the unbroken tradition of Roman Law."[5]

Obligations *ex contractu* were thus the legal bonds created by contracts (*contractus*) in the strict and special sense, and also those arising under the informal agreements or pacts that came to be specially recognised and enforceable either by the Praetorian law or by Imperial legislation.

The Justinianian law, as has been already indicated,[6] recognised four great classes of conventions or agreements that were enforceable as contractual obligations in the strict sense—namely, (1) Contracts *re* "real" contracts; (2) contracts *verbis* ("verbal" contracts); (3) contracts *litteris* ("literal" contracts); and (4) contracts *consensu* ("consensual" contracts).[7]

The contracts *Re* were agreements under which an obligation arose by reason of some particular act or fact, and not because of the employ-

[1] Justinian, *Inst.* iv. 6, 8.

[2] For the advantages of the *actio recepticia* over the *actio de constituta pecunia*, see Moyle, *Institutes of Justinian*, 4th ed., 547.

[3] *Code*, v. 11, 6. See "Dowry," *ante*, pp. 158-164, and specially Section 43.

[4] *Code*, viii. 54, 35, 5; cf. *Inst.* ii. 7, 2. See "Donation," *ante*, Part III., Chapter VI., p. 242 *et seq.*, and specially Section 84 at p. 243.

[5] Hunter, *Roman Law*, 4th ed., 550, *q.v.*

[6] *Ante*, p. 290.

[7] Justinian, *Inst.* iii. 13, 2; *Dig.* xliv. 7, 1 pr., and l.; Gaius, *Inst.* iii. 88, 89.

ment of any particular words or forms as in the formal contracts of the old *jus civile* such as *nexum*, *mancipatio*, *in jure cessio*, and *stipulatio*. The act or fact which was the thing (*res*[1]) that constituted the contract consisted in the delivery by one person to another of some property with the intention, at the time of delivery, of thereby imposing certain obligations upon the other, whether in respect of ownership, possession, or of mere physical detention. Such delivery of the property in any one of four particular modes constituted the real contracts distinguished respectively as *mutuum*, *commodatum*, *depositum*, and *pignus*; these were all constituted by mere delivery of property by one person to another, were all what were known as "equitable" contracts, and were wholly dependent for their validity upon the intentions of the parties and not upon the employment by them of any particular words or forms.

The contracts *verbis* ("by words") were certain agreements that derived their validity and enforceability from the use of certain formal and particular words.[2]

The most important of the "verbal" contracts was the "stipulation" (*stipulatio*), which was a formal and unilateral contract in which an obligation was created by the employment of a solemn form of spoken[3] question and answer. It was essential for this purpose that both of the parties should be present at the ceremony.

> In the earlier stages of the history of the stipulation the only words that could competently be used in asking the question and giving the answer were *spondes* and *spondeo*, signifying "Do you solemnly engage yourself?" and "I do solemnly engage myself," the verb *spondere* having a peculiarly solemn signification; moreover, the *sponsio*, as the stipulation was originally called on account of the use of these words, was a form of contract essentially pertaining to the *jus civile*, and as such was available only to Roman citizens,[4] and probably to non-citizens enjoying the privilege of *commercium*. In course of time other words with a less solemn signification came to be used, such as "Do you promise?" (*promittis*), and "I do promise" (*promitto*); "Will you give?" (*dabis*), and "I will give" (*dabo*); "Will you do?" (*facies*), and "I will do" (*faciam*); but until towards the end of the Republic these simpler forms were *stricti juris*, and as such binding only between citizens. The later forms of the *sponsio* had become *juris gentium* by the end of the Republic, and Gaius speaks of them as such and as consequently binding between citizens and non-citizens. The law of Justinian, following a Constitution of the Emperor Leo published in A.D. 472, did not insist upon the use of any strict form of words, or even that the words should be in the

[1] Hence the name "real" contract.

[2] See Justinian, *Inst.* iii. 15.

[3] The contract was essentially an oral one, but the agreement was sometimes subsequently expressed in writing for the sake of greater certainty.

[4] Gaius, *Inst.* iii. 93.

same language, provided that the procedure of question and answer was followed, that the answer agreed with the question, and that the words used sufficiently clearly expressed the intention of the parties.[1]

In the stipulation the obligation was created by the use of the formal words, which gave thereafter a right of action upon them irrespective of whether there was any true ground of debt; but this disadvantage was ultimately remedied by the introduction of words, in certain cases, excluding action if there was fraud, either prior or subsequent to the contract, on the part of the creditor[2] and by praetorian "exceptions" or equitable defences, such as the *exceptio doli* or plea of fraud.[3]

There were two other forms of "verbal" contract in the Roman Law besides the stipulation, namely, *Dictio dotis* and *jurata promissio liberti.*

Dictio dotis was an early form of agreement, obsolete in the later law, to give a dowry, and was competent only to the intended wife, to the wife's father or other ascendant, or to the wife's debtor by her express direction, while any other persons who gave, or who promised to give, a dowry (*dos*) required either to transfer the property or to enter into a formal stipulation with regard to it.[4]

The "verbal" contract known as *jurata promissio liberti* was constituted by an oral promise accompanied by a solemn oath made by a freedman to his patron immediately after his manumission, by which he undertook to perform for the latter certain specified services.[5]

Both the verbal contracts of *Dictio dotis* and *jurata promissio liberti* differed from the stipulation in not being put into the form of question and answer.[6]

The contracts *litteris*,[7] or "in writing," of the Roman Law were certain special obligations based upon particular written forms, such as the entry of a debt, either made mutually in the account books of the creditor and debtor or in the books of the creditor with the consent of the debtor, known as *expensilatio* or as *nomina transcriptitia* (*i.e.* "trans-

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[1] Justinian, *Inst.* iii. 15, 1; Gaius, *Inst.* iii. 92, 93.

[2] This was known as the *clausula doli.*

[3] See upon the stipulation and its history and place in the development of the Roman law of contract, Muirhead, *Roman Law*, 2nd ed., 213-219 and 256-258; Buckland, *The Origin and History of Contract in Roman Law*, 15-22; Poste, *Institutes of Gaius*, 4th ed., 333.

[4] See "Modes of Constituting *Dos*," *ante*, Part II., Section 43, p. 160.

[5] *Cf.* Poste, *Institutes of Gaius*, 4th ed., 338. See also, *ante*, Part II., Section 26, pp. 117, 118.

[6] See on the verbal contracts and the stipulation, Cuq, *Institutions Juridiques des Romains*, ii. 373 *et seq.*

[7] Justinian, *Inst.* iii. 21; Gaius, *Inst.* iii. 128-134. See also Cuq, *ut sup.*, 378.

ferred entries),[1] or written acknowledgments of debt, known either as *chirographa* or as *syngraphae*.

During the simpler period of the Roman Republic the regular keeping of private account books was regarded as a public duty invested with almost a religious character. Daily transactions were jotted down on rough memorandums (known as *adversaria*), and once a month these *memoranda* were entered in the principal ledger, known as the *codex* or *tabulae*. The entry in the domestic ledger was known as *expensilatio*, and if the debtor had made a corresponding entry in his account book this was called *acceptilatio*. The entry by the creditor alone was admissible evidence of debt, although it might be controverted, but a corresponding entry by the debtor was conclusive proof of his consent and of the existence of the debt, and the two entries together created an obligation *litteris*. The entry in the *codex* was equivalent to the interrogation in a stipulation, and had the same effect as if the parties had entered into a formal stipulation; the entry created a contract, and was not merely evidence of the existence of one. The actual ground of obligation in *expensilatio* was the implied consent of the debtor to the creditor's entry of the debt.

By the time of Cicero the domestic ledger or *codex* upon the entries in which the obligation of *expensilatio* or *nomina transcriptitia* was based was almost obsolete, and, except in the case of bankers or money-lenders, was entirely so by the time of Gaius, when the *nomina transcriptitia* had assumed the character of detached written acknowledgments of debt in the form of either *chirographa* or of *syngraphae;* these, indeed, had been in use in the time of Cicero, and had co-existed with *expensilatio*, which latter, however, was competent to Roman citizens only, while peregrins could avail themselves of *chirographa* (plu.) or of *syngraphae*.[2]

Syngraphae were acknowledgments of debt signed by both creditor and debtor, whereas *chirographum* (sing.) was an acknowledgment of debt signed only by the debtor, and delivered by him to the creditor.

By the time of Justinian the true "literal" contracts of *expensilatio*, *chirographum*, and *syngraphae* were no longer in use,[3] and their place was taken by a general acknowledgment of debt known as *cautio*. Unlike the true literal contract, however, *cautio* did not itself create a contract, but was merely available by way of proof of the existence of one; nevertheless, as *cautio* was protected by the same exception as

[1] See Gaius, *Inst.* iii. 128.

[2] Gaius, *Inst.* iii. 134. *Chirographa* and *syngraphae* were of Greek origin.

[3] *Inst.* iii. 21 pr.

the true literal contract,[1] it may be said to have been equivalent to, and to have superseded, contracts *litteris*.[2]

The contracts *consensu*,[3] or "by consent," were those created by the mutual consent of the parties, and which did not require for their constitution and validity any writing, or any special acts, or particular words or formalities, the mere consent of the parties being held sufficient to create a binding contract.[4]

The "consensual" contracts, according to Justinian's classification, were four in number, namely—(1) *Emptio-venditio* or sale; (2) *Locatio-conductio* or hire; (3) *Societas* or partnership; and (4) *Mandatum* or mandate or agency.

These contracts, completed, to the effect of being enforceable, by mere consent alone, pertain to the *jus gentium*,[5] and were all bilateral; they were contracts *bonae fidei*—*i.e.* "of good faith"—based essentially upon the intention of parties, and as such were enforceable by actions *bonae fidei* or actions under the Praetorian law, into which considerations of circumstances and equity were admitted.[6]

All the various kinds of agreements that have been mentioned as creating obligations *ex contractu* are known as the "nominate" contracts, and for the enforcement of each of these a special form of action was provided by the law. In order that an agreement (*conventio*) should be enforceable as a contract, it required either to fall within one or other of the categories of nominate contracts, or to be one or other of such informal agreements or "pacts" (*pacta*) as were specially recognised, and enforceable by action either as "added pacts" (*pacta adjecta*), or by the authority of the Praetor's edict (*pacta praetoria*), or by Imperial sanction (*pacta legitima*). All other agreements that did not fall within the category of any of the nominate contracts, or of the enforceable pacts, were regarded as "bare" or mere promises (*nuda pacta*), and as such could not form the basis of an action at law, although, as has been already mentioned,[7] they might modify, extend, or even terminate an existing enforceable contract.

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[1] *Exceptio non numeratae pecuniae* (*Code*, iv. 30, 3).

[2] In the *Corpus Juris Civilis* the term *chirographum* generally signifies a *cautio*, or a document which is evidence of the existence or the discharge of a debt (Poste, p. 365). See on the "Literal" contracts, Moyle, *Institutes of Justinian*, 4th ed., 492-496; Poste, *Institutes of Gaius*, 4th ed., 362-366; Sohm, *Institutes of Roman Law*, 3rd ed., 391-396; Hunter, *Roman Law*, 4th ed., 466-471; Sandars, *Institutes of Justinian*, 8th ed., 359-361; Roby, *Roman Private Law*, ii. 64-66, and 279-296 (Appendix to bk. v.).

[3] Justinian, *Inst.* iii. 22; Gaius, *Inst.* iii. 135-162.

[4] Justinian, *Inst.* iii. 22, 1; Gaius, *Inst.* iii. 136.

[5] See on the *Jus gentium*, Part I., Chapter II., Section 4.

[6] *Cf.* Justinian, *Inst.* iii. 22, 3; Gaius, *Inst.* iii. 137. In these contracts parties reciprocally bind themselves "to render what is fair and just."

[7] *Ante*, p. 291.

SECTION 103.—INNOMINATE CONTRACTS [1]

Justinian's division of obligations *ex contractu* was neither sufficiently exhaustive nor inclusive. There were a certain number of obligations which did not fall within any of the recognised "nominate" contracts, but which were created *re*, or by the delivery of a thing, and which were enforced by the law if one of the parties had performed his part of the agreement. Such obligations were based, and were enforced by the law, upon the principle of part performance, to the effect that if one of the parties to the agreement had done all that he had undertaken to do, the Praetor would, upon equitable grounds, compel the other party to perform his part of the agreement. Performance by one party was thus the consideration (*causa*) for performance by the other.

These obligations resembled the recognised contracts *re* in that they were created by something having previously been done or given by one party, but as they did not fall within the limited category of the recognised contracts *re* or any other of the "nominate" contracts, they are known as the "innominate" or "unnamed" contracts (*contractus innominati*). The circumstances in which such innominate contracts might be created are summed up by the jurist Paul [2] to the following effect:—(1) I *give* something to you in such a way that by the fact of my gift (i.e. *re*) you are bound to *give* something to me; or (2) I *give* so that you are bound to *do* something for me; or (3) I *do* something for you so that by the fact of my doing you are bound to *give* me something; or (4) I *do* something for you so that you are bound to *do* something for me.[3] The principal examples of innominate contracts in the Roman Law were *permutatio* or exchange, and *aestimatum* or compromise, which was the receipt of a thing under the condition of returning it or of paying its valued price, and *precarium* or occupancy at will.

Innominate contracts were thus in effect contracts *re*, and they were enforced by what was known as an action *in factum praescriptis verbis*, or one in which the "formula" for the trial of the action was adapted to the circumstances of the particular case (*in factum*) and preceded by a short statement of these circumstances (*praescriptis verbis*). The various forms of innominate contracts became recognised and enforceable between the reign of the Emperor Augustus and the close of what is known as

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[1] See on the innominate real contracts, Hunter, *Roman Law*, 4th ed., 540-545; Girard, *Manuel de Droit Romain*, 5th ed., 587-597; Sohm, *Institutes of Roman Law*, 3rd ed., 378-382; also Moyle, *Institutes of Justinian*, 4th ed., 398; Cuq, *Institutions Juridiques des Romains*, 444-448.

[2] *Dig.* xix. 5, 5 pr.

[3] *Aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias.*

the Classical period by the extension to them of the *actio in factum praescriptis verbis*, and of the action that had been originally intended to prevent the unlawful aggrandisement of the defendant who had obtained money or other property belonging to the plaintiff without any legal *causa* or consideration (*condictio causa data causa non secuta*).

Some examples of the various cases constituting innominate contracts may be instructive. Thus, exchange (*permutatio*) or the giving of one thing for another *thing*, and not, as in sale for money, was an instance of what Paul meant by *Do ut des*, or "I give that by the fact (*re*) of my giving you are bound to give something to me." *A.* gives *B.* a vase, and *B.* promises to give *A.* a horse in exchange, but subsequently refuses to do so. *A.* having performed his part can claim from *B.* either the restitution of the vase, or compensation for his failure to perform his promise to deliver the horse.[1] *A.* repairs *B.'s* house upon condition that *B.* shall repair a house belonging to *A.* This is an example of *Do ut facias*, or "I give something to you in order that, by the fact (*re*), you may be bound to do something for me." This case is differentiated from the contract of hire, for it is an exchange of services for services, and not of services for money. *B.* would here be bound to repair *A.'s* house or pay damages in an action *in factum*.[2]

As an instance of *facio ut des*, or "I do something for you so that you are thereby bound to give me something," *A.*, having lost some property offers a reward to the finder. *B.* finds and restores the property to *A.*, and he would have an action *in factum* against *A.* for the reward offered.[3]

As an example of *facio et facias*, or "I do something for you so that you are bound to do something for me"—*A.* has a slave *X.* (who is the son of *B.*), and *B.* has a slave *Y.* (who is the son of *A.*). *A.* agrees to manumit *X.* and *B.* to manumit *Y.* If *A.* manumits *X.* but *Y.* does not manumit *A.*, *Y.* would have an action (*in factum praescriptis verbis*) against *B.* for the value of the slave *X.*, whom he has manumitted on the faith of *B.'s* promise to manumit *Y.*[4]

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[1] *Dig.* xix. 5, 5, 1 ; cf. *Dig.* xix. 4, 1, 4. See for further examples of *Do ut des*, illustrating the analogy to *Sale*, *Hire*, *Mutuum*, *Mandatum*, *Depositum*, and *Commodatum*, Hunter, *Roman Law*, 4th ed., 541-543.

[2] *Dig.* xix. 5, 5, 2. See Hunter, *ut sup.*, 544, for further examples.

[3] *Dig.* xix. 5, 15. See Hunter, *ut sup.*, for commentary on this instance.

[4] *Dig.* xix. 5, 5, 5. See Hunter, *ut sup.*, 545, for further examples.

CHAPTER III

Obligations Arising out of Implied Agreement (Quasi ex contractu) in General[1]

Certain obligations were created by facts and circumstances alone independently of the will or consent of the parties, and were enforced by the law upon purely equitable considerations, without the necessity of an agreement (*conventio*), because the circumstances resembled those by which contract was created, and by them parties were placed in such a position towards each other "as if" (*quasi*) they had contracted. Obligations of this nature were styled, in consequence, *quasi ex contractu*. In the case of obligations *ex contractu* parties were bound because they had expressly agreed to be bound, whereas in obligations *quasi ex contractu* parties were bound, not because they had so consented but because the law considered the circumstances to be such that upon grounds either of equity or of public policy they ought to be bound. Notwithstanding the difference in their grounds of obligation, however, both obligations *ex contractu* and *quasi ex contractu* created rights *in personam*.[2]

Examples of quasi-contractual obligations in the Roman Law were (*a*) *Negotiorum gestio*, or the dealing by one person with the property or the affairs of another person without that other person's previous knowledge or assent and in his absence.[3] The contractual relationship in such a case was analogous to that created by the express consensual contract of *mandatum* or "mandate";[4] (*b*) *solutio indebiti*, or the payment under an error as to fact, but not of law,[5] and not under a natural obligation, of money that was not truly owing. There was in such a case an implied obligation on the part of the person who had received the money to restore it to the person who had paid it, and the

[1] Justinian, *Inst.* iii. 27. See also on quasi-contracts generally, Hunter, *Roman Law*, 4th ed., 655, 656.

[2] See upon "real" and "personal" rights, *ante*, Part III., Section 69, p. 212.

[3] Justinian, *Inst.* iii, 27, 1. See also *Dig.* iii. 5, 2; *Dig.* xliv. 7, 5 pr.; *Code*, ii. 18, 20.

[4] See on *negotiorum gestio*, Hunter, *Roman Law*, 4th ed., 661-666; Mackenzie, *Roman Law*, 7th ed., 262, 263; Sohm, *Institutes of Roman Law*, 3rd ed., 411.

[5] *Dig.* xii. 6, 1, 1; *Code*, i. 18, 12; *Dig.* xxii. 6, 9 pr.; *Dig.* xxii. 6, 2. See upon this point Mackenzie, *Roman Law*, 7th ed., 264-266.

latter could sue for it by the action known as the *condictio indebiti*. This quasi-contractual obligation was analogous to the contract of *mutuum*.[1] (*c*) The quasi-contract known as *receptum nautarum, cauponum, stabulariorum*, which was the implied obligation placed upon "shipmasters, innkeepers, and stablers" (*nautae, caupones, et stabularii*) by the Praetorian Edict imposing upon them an absolute liability for the loss of or damage to property entrusted to their care by sea or land, unless the loss or damage had been occasioned by circumstances beyond their control, or by carelessness (*negligentia*) on the part of the person who entrusted the property;[2] (*d*) the implied obligations placed by the law upon tutors[3] and curators[4] in relation to their pupils and wards respectively; and also (*e*) the implied obligations arising between owners-in-common and joint-owners,[5] co-heirs,[6] and legatees.[7] The cases of joint-owners, co-heirs, and legatees are examples of what was styled *communio incidens*, or an accidental relation between persons without any consent on their part by which they are placed in a position as if they had made a contract; the relation was truly a fiduciary one, and the obligation so created was analogous to *societas* or partnership.[8]

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[1] Justinian, *Inst.* iii. 27, 6; *Dig.* xliv. 7, 5, 3. See also Hunter, *ut sup.*, 657 *et seq.*, upon money paid by mistake.

[2] *Dig.* iv. 9. This example of quasi-contract is not mentioned in the *Institutes* of Justinian.

[3] Justinian, *Inst.* iii. 27, 2; *Dig.* xliv. 7, 5, 1.

[4] Cf. *Inst.* iii. 27, 2; and *Dig.* iii. 5, 3, 5; iii. 27, 3, 43; and Sandars, *Institutes of Justinian*, 8th ed., 387.

[5] Justinian, *Inst.* iii. 27, 3; *Dig.* xvii. 2, 31, 4.

[6] Justinian, *Inst.* iii. 27, 4; *Dig.* xvii. 2, 34.

[7] Justinian, *Inst.* iii. 27, 5; *Dig.* xliv. 7, 5, 2.

[8] These various forms of quasi-contractual obligations are more particularly considered later on in Chapter X., p. 411 *et seq.*

CHAPTER IV

Obligations Arising out of Actual Wrongdoing (Ex delicto),[1] and out of Circumstances Inferring or Resembling Wrongdoing (Quasi ex delicto)[2] in General

Obligations *ex delicto* or "delicts" were those legal obligations that arose by reason of the wilful commission of an actionable injury or wrong to either one's person or one's property, or, as they have been otherwise more truly defined, "offences wilfully committed in violation of law."[3] An obligation resembling that created by wilful breach of the law may arise in such circumstances that the law will hold a person liable for injury, even although he has neither had an unlawful intention nor been negligent; such were known as obligations *quasi ex delicto*.[4]

The wrongful acts which were regarded by the Roman Law as "delicts" giving rise directly to obligations *ex delicto* constituted a small and rather arbitrary category that did not include many other injurious acts which, by the fact of their commission, gave rise to a legal liability to make reparation; the latter kind of acts, because they did not fall within the limited category of acts that were "delicts" strictly so-called, were distinguished as "quasi-delicts" in connotation of the analogy in the modes of their creation.[5]

The Roman Law drew an important distinction between private wrongs (*delicta privata*) and public wrongs or crimes (*crimina publica*). "Delicts" or wrongs were either public or private according as the offence was one against the State, or against private individuals, or as the wrongdoer was liable to public accusation and prosecution by a State criminal tribunal, or as he was merely liable to a civil action at the instance of the particular person injured for compensation in respect of the injury.

The Roman Law included, amongst private wrongs or civil offences, certain acts such as theft (*furtum*) and robbery (*rapina*), which, in modern law, are usually regarded as entirely public offences or crimes

[1] Justinian, *Inst.* iv. 1-4; Gaius, *Inst.* iii. 182-225; *Dig.* xlvii.
[2] Justinian, *Inst.* iv. 5; *Dig.* xliv. 7, 5, 4-6.
[3] Mackenzie, *Roman Law*, 7th ed., 268.
[4] Justinian, *Inst.* iv. 5; *Dig.* xliv. 7, 5, 4-6.
[5] On "Quasi-delicts," see *post*, Chapter XI., p. 420.

and punished as such. This is accounted for by the fact that the private wrongs of the Roman Law were those delicts that, in early times, were left to private vengeance, and for which in later times there was substituted a civil action by the injured person against the wrongdoer.[1]

The rights and obligations arising from private delicts are treated by Justinian in his *Institutes* under the four heads of *Furtum*, *Rapina*, *Damnum*, and *Injuria*. *Furtum* was theft unaccompanied by violence; *Rapina* was "robbery" or theft attended with violence against the person; *Damnum* (or *damnum injuria datum*) signified loss generally, and was specially used to mean the loss, or the diminution, or the deterioration of a person's property by reason of either (*a*) the wilful wrongdoing, or (*b*) the culpable negligence of another person; *Injuria* meant a wrong or injury done to one's person or to one's reputation, as distinguished from one's property. The three forms of private delict first enumerated—namely, *furtum*, *rapina*, and *damnum*—were "patrimonial" wrongs, or injuries caused to property, and gave rise to a claim for reparation or compensation under the "Aquilian law"; the *Lex Aquilia*[2] was enacted about B.C. 287, and is important as constituting practically the whole Roman Law of liability for injury to property caused either intentionally and deliberately, or unintentionally through fault and negligence. The obligation upon the wrongdoer *ex delicto* under the later law might be to pay damages, or to pay a penalty, or to pay both damages and a penalty, according to circumstances.[3]

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[1] Poste, *Institutes of Gaius*, 4th ed., 402. "Crimes have been defined to be such unlawful acts as are injurious in the first instance to the State; civil injuries such as are harmful, principally or exclusively, to private individuals. But this definition is not satisfactory, because all or most crimes are injurious to private individuals, and all or most civil injuries are harmful to the community. A better definition is the following: Crimes are those unlawful acts which the State itself visits with punishment, considering them to be specially injurious to its interests; private delicts are unlawful acts or offences which the injured party may himself vindicate by action. The same unlawful act which in one stage of society is pursued as a private delict may, at a subsequent stage, be punished as a crime. So, again, in later Roman Law the same delictal act, *e.g. furtum*, might be pursued either as a crime or as a civil injury" (Poste, *ibid.*).

[2] See Munro, *The Lex Aquilia* (*Dig.* ix. 2), Camb. University Press, 1898.

[3] See further, and more particularly upon "Delicts" and "Quasi-delicts," *post*, Chapters XI. and XII., pp. 420, 437.

CHAPTER V

Essentials of a Valid Contractual Obligation[1]

In considering the requisites and the characteristics of a valid contractual obligation it is necessary to distinguish between (*a*) the essence, (*b*) the nature, and (*c*) the accidents of a contract.

A thing is of the *essence* of a contract if the latter could not exist without it, as, for example, a thing to be sold and a price in a contract of sale.

A thing is of the *nature* of the contract if it is included in it by mere operation of law without the necessity of being expressed.

A thing is an *accident* of a contract if it forms no part of the contract unless it is expressly made such, and is not inherent in the nature of the contract itself.[2]

In order to render a contractual obligation valid and effectual the person granting the obligation must be legally capable of contracting, and the obligation must be undertaken for himself, unless he has been either expressly or by implication authorised to act for another; for no one can contract for and bind another person without that other's authority. Moreover, the act to be done in respect of the obligation, or, in other words, the object of the contract, required to be (*a*) lawful, (*b*) possible, (*c*) definite; and the consent to the contract required to be both (*a*) voluntary and (*b*) mutual.

It will thus be seen that the considerations with regard to the validity of a contractual obligation have a threefold aspect according as they relate to (1) the person contracting, (2) the act or object of the contract, and (3) the consent to the contract. With regard to the person contracting, the consideration is (1) as to his legal capacity to contract,[3] and (2) as to whether he is contracting in order to bind himself or another person; with regard to the act or object of the contract, the consideration has reference to whether the act is (1) lawful, or (2) possible, or (3) definite, or any, or all of these. With regard to the consent to the obligation the consideration is as to whether the consent is (1) mutual and (2) voluntary.

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[1] *Cf.* Cuq, *Institutions Juridiques des Romains*, ii. 352 *et seq.*

[2] *Cf.* Mackenzie, *Roman Law*, 7th ed., 207; Pothier, *Traité des Obligationes*, pt. i., ch. i., s. 1, Art. 1, s. 3; Girard, *Manuel de Droit Romain*, 5th ed., 443.

[3] See on "Legal Capacity of Persons," *ante*, Part II., Chapter III., p. 80 *et seq.*

Lawful Object.—The act undertaken to be done must be a lawful one, so a promise in a contract was void if it was to do an act which was either prohibited by law, or was contrary to morality or to public policy.

Possible Object. — The act to be done under the contract, or the obligation undertaken, must be possible of performance; no one can bind himself to do something that is, from the very nature of things, impossible. The impossibility of an act may be either (*a*) physical or (*b*) legal; for example, an undertaking to sell something that does not exist, and that could not, from the very nature of things, exist, or to do something obviously beyond human power and capacity, would be void on the ground of *physical* impossibility; whereas a promise to sell something that was *extra commercium* would be legally impossible, there being nothing in the physical character of the thing to prevent the performance of the promise, and the impossibility arising solely from the prohibition of the law.

The impossibility must be something essential and absolute, so that if the act to be done was only temporarily impossible, but would or might become possible, the undertaking would be valid.

If the act to be performed in respect of the obligation, although itself quite possible of performance, was qualified or limited by an impossible condition,[1] the whole agreement would be thereby rendered null and void.

Definite Object.—The act to be done in respect of the obligation ought to be sufficiently clear and definite for the parties to be able to understand exactly the nature of the undertaking to which they have agreed; if the nature of the act to be done is so vague or indefinite as not to be clearly intelligible, it cannot be enforced.

Consent.—All contracts imply consent,[2] and the consent must be both (*a*) mutual and (*b*) voluntary.

"Mutual" consent is the agreement of two or more persons "upon the same thing in the same sense."[3] In order to establish an enforceable obligation or promise the offer must have been accepted in the same sense as that in which it was made, and as it was intended to be understood. Intention, however, as a mental act can only be expressed through the medium of language or of acts, and error or mistake may in that way arise which may invalidate the contract.[4]

"Voluntary" consent necessarily implies that the parties have, of

[1] See "Conditional Obligations," *post*, p. 318.
[2] Cf. *Dig.* xliv. 7, 3, 1.
[3] *Consensus in idem placitum* (*Dig.* ii. 2, 14, 1, 2).
[4] *Cf.* Hunter, *Roman Law*, 4th ed., 581.

their own free will (*voluntas*), agreed to be bound in full understanding of that to which they were consenting. The Roman Law required that, in order that the consent should be regarded as "voluntary," it must not have been obtained (*a*) by violence (*vis*), (*b*) by fear or intimidation (*metus*), (*c*) by fraud (*dolus*), (*d*) without a proper consideration (*sine causa*), or (*e*) for an illegal consideration (*injusta causa*).[1]

SECTION 104.—ERROR OR MISTAKE AND ITS EFFECT UPON CONTRACTUAL OBLIGATIONS[2]

Consent is the essence of all contractual obligations. The consent must, however, be true consent, and not merely apparent. Real consent exists only when the parties to the contract agree, both mutually and voluntarily, "upon the same thing in the same sense"; the *intention* of the parties must coincide in order that the agreement should constitute an enforceable obligation, or, in other words, the offer must be accepted in the same sense as that in which it was made. But intention is a mental act to which process expression is given, and which can only be known or ascertained by means of language, or acts, or both. Owing, however, to the uncertainty or the indefiniteness of the language used, or of the acts employed, as a means of expressing the intention of the parties, misunderstanding, or, as it is generally styled, "error" (*error*) may arise.

Error is of two kinds—(1) essential, and (2) non-essential, which, in the Roman Law, were distinguished respectively as *error in corpore* and *error in substantia* or *materia*.

An "essential" error (*error in corpore*) is one of such a nature that it entirely prevents an agreement between the parties upon the same thing in the same sense, and consequently vitiates any consent.[3] "Essential" error may arise in any of three ways—namely, as to (1) the subject of the contract or the thing promised (*corpus*), (2) the nature of the obligation, and (3) the person bound by the agreement. Thus a man may promise a thing to another who really means to accept something else;[4] or parties may agree upon the thing, but each understand different kinds of obligations in connection with it; or a man

[1] See further on "Voluntary Consent," *post*, p. 310.

[2] See Hunter, *Roman Law*, 4th ed., 580, 584; Girard, *Manual de Droit Romain*, 5th ed., 460, 462; Buckland, *Roman Private Law*, 287-289; Sohm, *Institutes of Roman Law*, 3rd ed., 210, 211.

[3] Cf. *Dig.* xxxix. 3, 20, *Nulla enim voluntas errantis est*; also *Dig.* l. 17, 116, 2, *Non videntur qui errant consentire.*

[4] Justinian, *Inst.* iii. 19, 23.

intending to bind himself to a particular person may really bind himself to another.[1]

As an example of a mistake as to the subject of the contract or the thing promised (*corpus*), *A.* promises a thing, *X.*, to *B.*, who, through misunderstanding, intends to accept a different thing. Thus *A.* agrees to sell to *B.* for a certain agreed price a farm known by the special name of *X.*, but *B.* is mistaken as to the name, by which he understands and intends to buy quite a different farm; there would be, in such a case, no contract of sale, because what the one intended to sell the other did not intend to buy.[2] If, however, both parties knew the same property merely by different names the contract would be good; for a mistake in the name is immaterial if there is truly consent as to the same thing in the same sense.[3]

As an example of an error as to the nature of the obligation undertaken, *M.* agrees to let a farm to *S.* for a certain period; *S.*, misunderstanding, in good faith, agrees to buy the farm; there would be no contract in such a case, fort he one has in view the duties attaching to the contract of sale, and the other those attaching to the contract of hire.[4]

As an example of an error with regard to the person bound by the agreement, *A.* agrees to advance money to *B.*, whom he knows by repute to be an honest man. *C.* brings to *A.* another man of the name of *B.* who is not respectable, and he induces *A.* to lend the money to *B.* under the mistaken belief that he is the man *B.* whom he had in his mind when he made the promise. In this case there would be no contract, and both *C.* and the spurious *B.* would be guilty of theft and of fraudulently obtaining the money.[5]

A "non-essential" error (*error in substantia* or *materia*) is one that does not prevent an agreement being made between the parties with regard to the same thing, but which may, in certain circumstances, entitle one of the parties to be freed from the obligation. In other words, an error is "non-essential" when it has reference to the substance or the material qualities of the subject of the contract, or to the motive or purpose of the agreement, but not to the subject itself. The parties may have agreed upon the same thing in the same sense, so that there would be no error *in corpore* or "essential" error, but the one party may have, unknown to the other, and in perfect good faith, a wrong or mistaken belief as to the qualities of the subject, or as to the motives and purpose of the agreement. Whether or not a "non-

[1] *Cf.* Hunter, *ut supra*, 581.

[2] *Dig.* xviii. 1, 9 pr.

[3] *Dig.* xviii. 1, 9, 1 : *Nihil enim facit error nominis, cum de corpore constat.* *Cf.* also *Dig.* xix. 2, 52.

[4] *Dig.* xliv. 7, 57 ; cf. *Dig.* xiii. 1, 18 pr. and 1.

[5] *Dig.* xlvii. 2, 52, 21 ; xlvii. 2, 66, 4.

essential" error would suffice to invalidate an agreement depends upon the materiality or degree of error as to the qualities of the subject, which is, in each case, a question of circumstances. Thus *A.* and *B.* agree upon a specific article *X.*, and *B.* undertakes to buy it from *A.* for a certain price; but *B.* in agreeing to this was under the mistaken belief that the thing was made of silver, while *A.* knew that it was made of (say) lead or tin, but was unaware of the mistaken belief possessed by *B.* In such a case the agreement would be void, because the mistake was as to the actual material of which the thing was composed, each party contemplating an entirely separate category of merchandise.[1] Similarly the contract would be void if wine was bought that was in reality vinegar, unless it only became vinegar when sour after the sale, in which case the sale would be good, for the buyer would have got what he intended.[2] So also the sale of a slave would be void if it was believed to be of one sex when the seller, in good faith, knew it to be of the other, for the distinct uses to which slaves of different sexes were put, placed them in different categories of merchandise; on the other hand, however, the purchase of a female slave as a virgin when she was not, would not vitiate the contract, for the error was merely one as to the inherent quality of the subject.[3]

B. agrees to buy from *A.* at a fixed price a particular article which he believes to be of the finest quality of gold. *A.* knows that the article is of an inferior quality of gold, but is unaware of *B.'s* erroneous belief as to the superiority of its quality; in this case the contract would be good, because there was no mistake as to the actual material of the subject, but merely with regard to the quality of the material of which the subject (*corpus*) is composed.[4]

It will thus be observed that in cases of "non-essential" error the parties are agreed upon the same thing, but not in the same sense; both parties are under an innocent mistake unknown to the other. In one case, however, the mistake may be more serious than in another; it may relate to the actual nature of the subject (although not to the subject itself), or it may be only with regard to certain qualities of the subject; but an error in relation to the quality of the subject

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[1] *Dig.* xviii. 1, 9, 2.

[2] *Dig., ut supra.*

[3] Cf. *Dig.* xviii. 1, 11, 1.

[4] *Dig.* xviii. 1, 10. Other examples of non-essential error may be cited: (1) Article sold believed to be gold but really mainly bronze—sale good because subject consisted partly of gold (*Dig.* xviii. 1, 14). (2) Table sold covered with silver, but believed by the purchaser to be solid—sale void (*Dig.* xviii. 1, 41, 1); but *cf.* Ulpian (in *Dig.* xviii. 1, 14), who holds the contrary view in the analogous case of a thing merely gilt with gold.

of the agreement may invalidate a contract if its effect is to place the subject in a different category of merchandise from that which was contemplated by the parties.

The degree or materiality of *error in substantia* or *materia* that would suffice to invalidate a contract was the subject of much dispute amongst the Roman jurists, and in Roman practice much difficulty was experienced in attempting to determine the point; the multitude of cases cited in the Roman law books are indecisive and often conflicting; the general conclusion is that the matter is incapable of exact definition, depending upon the whole circumstances of each particular case.[1]

SECTION 105.—VOLUNTARY AND INVOLUNTARY CONSENT

The consent to a contractual obligation, besides being mutual, required to be "voluntary" or free consent; consequently an agreement based upon a consent that was apparently voluntary but which was not really so was invalid. So a promise or undertaking that had been obtained by means of force, whether actual physical violence (*vis*), or moral compulsion and intimidation (*metus*), or by fraud, could not be enforced.

Force, fear, fraud (*vis, metus, dolus*).—It is obvious that force and fraud are inconsistent with voluntary or free consent, and therefore a promise given in such circumstances does not bind anyone. The two terms *vis* and *metus* correspond to what is nowadays usually styled "force" and "fear," and *dolus* is equivalent to fraud, whether actual or constructive.

In the Roman Law the strict distinction between the two terms was that *vis* signified actual physical violence,[2] while *metus* meant moral compulsion or intimidation, or a threat of such present immediate evil as would shake the constancy of a man of ordinary firmness;[3] but in ordinary practice the term "violence" usually comprises both physical and moral force, and *vis* and *metus* are ordinarily employed in conjunction as a single legal expression known as "force and fear," or simply as "intimidation."

Vis, as mentioned incidentally above, signified, literally, actual physical force and the actual exercise of superior physical force in order to compel the giving of the promise in the contract;[4] while *metus* meant, literally, "fear," and in a legal sense signified "intimidation," or a threat of actual injury made in order to compel the giving

[1] *Cf.* Hunter, *Roman Law*, 4th ed., 582, 583.
[2] *Dig.* iv. 2, 2.
[3] *Dig.* iv. 2, 5-7.
[4] *Vis est majoris rei impetus qui repelli non potest* (*Dig.* iv. 2, 2).

of the promise through fear of the consequences of refusal. In order, however, to constitute *metus* or intimidation in this sense, it was essential, according to the Roman Law, that the threat should be one of such present immediate evil as would shake the constancy or will of a man of ordinary and reasonable firmness—having regard always, however, to the age, sex, and the mental and moral condition of the person. It was necessary that the force which had induced the giving of the promise, whether it was physical force or merely moral compulsion, should amount to "an immediate present danger" or to a fear of injury that would immediately follow upon a failure to give the promise required; consequently a mere apprehension of possible future injury was not sufficient to invalidate a contract.[1] The effect upon the contract was the same whether the physical violence (*vis*) or the moral violence (*metus*) was on the part of the person in whose favour and for whose benefit the promise was given, or was on the part of a third person who was not a party to the contract; and the defence of "violence" or of "intimidation" was available, no matter by whom the violence or the intimidation had been committed.[2]

In order that violence or intimidation should vitiate an agreement it required to be illegal; it was not every form of violence that, by the Roman Law, constituted an illegal act, and there were circumstances in which violence or intimidation might be even justifiable.

As examples of violence or intimidation invalidating an agreement as being illegal in its nature, the following will suffice: A promise extorted from a man by shutting him up in a house until he should give it;[3] a promise extorted by threat of death or torture;[4] money given under threat to destroy the title-deeds of the giver's freedom, which are in the other's possession;[5] the master of an athlete slave promises money to a usurer which he does not owe him because the usurer detains his slave, and threatens to prevent him competing in the public games unless and until the money is paid;[6] a man promises to pay a sum of money to a magistrate who threatens to condemn him, although innocent, unless he does so; the promise is void, because the threat is an unlawful exercise of the magistrate's authority.[7]

The following are examples of violence or intimidation that was not considered illegal, and which consequently did not vitiate the consent to an agreement: A stipulation made by a party to an action that he will ensure his neighbour—the complainant—from loss in the event of the

[1] *Dig.* iv. 2, 4-8, 9 pr.
[2] *Dig.* iv. 29, 1.
[3] *Dig.* iv. 2, 22.
[4] *Code,* ii. 20, 7.
[5] *Dig.* iv. 2, 4; iv. 2, 8, 1.
[6] *Dig.* iv. 2, 23, 2.
[7] *Dig.* iv. 2, 3, 1.

stipulator's house falling down, made on a threat by the Praetor that if he does not so stipulate he will give the house into the custody of the other party; the promise is here valid because the intimidation is, in the circumstances, a lawful exercise of the Praetor's authority.[1] The patron of a freedwoman, who has been wrongfully sued by her, threatens to reduce her again to slavery on the ground of "ingratitude," and she induces him to refrain from doing so by promising him a sum of money; the promise is valid, for the threat was one which, in the circumstances, the patron was legally entitled to use.[2]

Threatening language used in the heat of an angry altercation (*in rixa*) did not amount to intimidation (*metus*).[3]

Dolus, or "Fraud."—In the Roman Law of Contract *dolus* is a wide term embracing every kind of failure in honest dealing, whether actual or constructive, and it signified generally such fraud or deception in obtaining the consent or promise as would render the enforcement of the contract inequitable.[4] The agreement was only voidable, however, on the ground of *dolus* if the fraud had been perpetrated by a person who was a party to the contract; and if the fraud had been committed by a third person, who was not a party to the agreement, the contract was valid, but the person bound by the contract could sue the third person who had defrauded him for reparation on account of his fraud.[5] *Dolus*, as a Roman legal term, occurs chiefly in the two forms of (1) *suggestio falsi* and (2) *suppressio veri*.

Suggestio falsi, or, literally, "the statement of something false," was an expression used to signify the representation as a fact of something that the person making the representation either knows, or does not believe, to be a fact.

Suppressio veri, or, literally, "the suppression of something true," was an expression used to signify the intentional concealment of a fact by a person having knowledge or belief of the fact.

The following are examples of *suggestio falsi*:—

A seller lies to a buyer with regard to the skill, or the *peculium* of a slave that he is selling, and must consequently either make good to the buyer the difference in value of the slave or submit to the cancellation of the sale.[6] A man sells to another man a female slave, stating that she

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[1] *Dig.* iv. 2, 3, 1.

[2] *Dig.* iv. 2, 21 pr.

[3] *Code*, ii. 20, 9. See, for these and further illustrations of legal and illegal violence, Hunter, *Roman Law*, 4th ed., 594, 595.

[4] See, for the definition of *dolus malus* by the jurist Labeo and approved by Ulpian, *Dig.* iv. 3, 1, 2: *Omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita.*

[5] *Dig.* xliv. 4, 2, 1. His remedy was the *actio de dolo.*

[6] Paul, *Sent.* ii. 17, 6.

had borne children, which she had not done, or stating that she is a virgin knowing that she has borne children; in such a case he required to submit to either reduction of the price or to cancellation of the sale.[1]

The following are examples of *suppressio veri*:—

A man sells to another a property without informing the buyer of an annual burden upon it.[2] A man sells to another a slave that he knows is given to stealing, and says nothing as to the fact; in such a case the seller was liable in damages even before the slave had stolen anything.[3] A man sells to another an ox suffering from a contagious disease, which affects and destroys the other's cattle; if the seller knew that the ox was diseased he was liable, for his failure to disclose the fact, to pay the value of the whole of the cattle so lost, but if he did not know he could only claim from the buyer what the latter would have given if he had known that the ox was diseased.[4]

Dolus in a special sense might also arise, or be legally inferred, from the fact that the contract had been made either (*a*) without a valuable consideration (*sine causa*) or (*b*) for an illegal consideration (*injusta* or *turpis causa*).

The mere absence of a consideration or inducement to give the promise did not of itself necessarily invalidate a contract, because it might be the fact that either (*a*) the parties did not intend a consideration, or (*b*) that a consideration was intended, and was, in the particular circumstances, reasonable and sufficient. If, however, neither of these elements was present, the contract was "without consideration" (*sine causa*), and to insist upon its performance would constitute *dolus*.

When the "consideration" or inducement offered in order to bring about the giving of the promise was an illegal one, the contract was vitiated by *dolus*.[5]

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[1] Cf. *Dig.* xix. 1, 11, 5.

[2] *Dig.* xix. 1, 41; xix. 1, 21, 1. If a seller knew of the existence of a right of servitude enjoyed by the property, and did not inform the buyer, he was liable in damages if the buyer lost the right through "non-use" (*non utendo*) (*Dig.* xviii. 1, 66, 1). But a seller was not liable for not informing a buyer of the existence of servitudes on the property if he himself did not know of their existence (*Dig.* xxi. 2, 75; xix. 1, 1, 1; xviii. 1, 66 pr.).

[3] *Dig.* xix. 1, 4 pr.

[4] *Dig.* xix. 1, 13 pr. See also *Dig.* xix. 2; xix. 1. See Hunter, *Roman Law*, 4th ed., 596, 597, for these and many other examples of *suggestio falsi* and *suppressio veri*.

[5] *Code*, iv. 7, 5; iv. 7, 1. It is necessary to clearly distinguish the promise in a contract from the inducement to give the promise.

CHAPTER VI

The Promise in a Contract

We have considered how contracts or agreements might be invalidated by reason of the mode in which they originated, and because of the way in which the promiser was induced to give his promise, whether that way were by force (*vis*), or intimidation (*metus*), or fraud (*dolus*), or without a consideration (*sine causa*), or for an illegal consideration (*injusta causa*).

The *promise* in the contract as distinguished from the consideration or inducement to give the promise might itself vitiate the contract on account of either its (*a*) impossibility, or (*b*) its illegality.

The Roman Law required that the promise in a contract, in order to be valid, should be (*a*) possible, (*b*) legal, and (*c*) made by a person legally capable of contracting.

(a) *Possible Promise.*—The act to be done in respect of the promise must be possible of performance; if it is impossible the promise is void.[1] Impossibility may be either physical or legal. A promise to sell something *extra commercium*[2] would be either physically or legally impossible, according as the incapacity to be held in private ownership arose from the very nature of the thing itself or merely from legal enactment.

"Impossibility" of performance in the strict legal sense only exists when performance is humanly impossible from the very nature of things, and the act is one which no human person can do,[3] but there is no impossibility present that is sufficient to invalidate a promise when a person merely undertakes to do what he himself cannot perform, if the act is, at the same time, one which can quite humanly be done.[4]

Thus a promise to sell something non-existent would be void, as when a man stipulates for something which either does not now or cannot exist, such as a slave or a horse that has died, but which he believes to be alive, or a freeman whom he believes to be a slave,

[1] *Cf. Dig.* l. 17, 185 : *Impossibilium nulla obligatio est.*

[2] See on things *in commercio* and *extra commercium*, Part III., Section 67 (h), p. 203.

[3] *Cf.* Justinian, *Inst.* iii. 15, 5 ; *Dig.* xlv. 1, 73 pr. ; xiii. 4, 2, 6.
Cf. Dig. xlv. 1, 137, 5.

or a *res religiosa* which he does not know to be *extra commercium*, or a mythical creature that never did and cannot from the nature of things exist, such as a hippocentaur.[1]

On the other hand, a promise is not "impossible" merely because the promiser cannot himself perform it, as if, for example, a man were to undertake to deliver to another a quantity of a particular mineral or material which he has not got; for although he has not got it, there is nothing humanly impossible about obtaining it, and so the promiser would be liable for breach of his promise if he failed to deliver what he had promised.[2]

The impossibility of performing the promise may be either (*a*) known or unknown to both parties, or (*b*) known to one only of the parties. In the former case the promise would be void,[3] but in the latter case the party in knowledge of the impossibility would be liable for his failure to perform. Thus, for example, if a contract for the sale of a house was entered into between two persons, the house being in reality non-existent at the time of the sale owing to having been destroyed, as by fire, there would be no sale, and the promise in the contract would be void on the ground of impossibility if both parties were ignorant of the fact; but if the buyer was aware of the previous destruction of the property, he would be bound by the contract and liable to pay the whole price; on the other hand, if the seller alone knew of the non-existence of the subject the contract would be void, but the seller would have to compensate the buyer for his fraud (*dolus*); if both seller and buyer knew of the destruction of the property, the promise would be void and there would be no contract or liability, for both parties would be equally guilty of *dolus*.[4]

(b) *Legal Promise.*—A promise was legal, according to the Roman Law, if it was not contrary to (*a*) some particular law, or (*b*) public morality, or (*c*) public policy.[5]

Thus particular laws forbade certain acts; the Twelve Tables declared it to be unlawful to sell stolen property;[6] a *Senatus-Consultum* prohibited the sale of fugitive slaves,[7] and the sale of grain that had

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[1] Gaius, *Inst.* iii. 97, 97*a*; Justinian, *Inst.* iii. 19, 1.

[2] Cf. *Dig.* xlv. 1, 137, 5.

[3] *Dig.* xviii. 1, 15 pr.

[4] Cf. *Dig.* xviii. 1, 57 pr., 1, 2, 3. *Cf.* also *Dig.* xi. 7, 8, 1; a man knowingly sells as *in commercio* a thing that is *extra commercium*; the contract was void, but the seller would be liable in damages to the buyer for his fraudulent misrepresentation.

[5] *Code*, ii. 3, 6.

[6] *Dig.* xviii. 1, 34, 3.

[7] *Dig.* xviii. 1, 35, 3.

been stored for public distribution was similarly forbidden;[1] a promise to kill or to injure a person, or to steal, or to commit some other criminal act,[2] or a promise to hold a man free from liability to punishment,[3] was void on the ground of both public policy and public morality; on the ground of public policy, also, a promise to marry someone already married when that person should obtain divorce was void.[4]

(c) *Promise must be by some one Legally Capable of Contracting.*—The question of legal capacity to contract and the various modes and circumstances in which it might be qualified or limited has been already considered.[5]

SECTION 106.—QUALIFICATION OR LIMITATION OF THE PROMISE IN A CONTRACT[6]

A promise in a contract may be either (*a*) simple and unconditional, or (*b*) qualified or limited.

The qualification of the promise may be (*a*) with regard to the time of performance, or (*b*) with regard to the place of performance, or (*c*) in respect of a condition attached to the promise.

A limitation of the promise in any of these ways affects the validity or the operation of the contract in a greater or less degree, according to the particular terms of the qualification.[7]

(A) *Simple and Unconditional Promise.*—This is a promise without qualification and limitation of any sort.

(B) *Qualified Promise.*—(a) *Qualification of Promise as to Time of Performance.*—A promise is said to be qualified as to time when a particular time for performance is agreed upon by the parties. According to the Roman Law, if no particular time was fixed in the contract, performance was immediately exigible and could be at once demanded.[8] The nature of the circumstances, however, might

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[1] *Code*, iv. 40, 3.

[2] Justinian, *Inst.* iii. 19, 24; *Inst.* iii. 26, 7; Gaius, *Inst.* iii. 157; *Dig.* xlv. 1, 26, 27; xvii. 1, 22, 6.

[3] *Dig.* xiii. 6, 17 pr.; ii. 14, 27, 3. But although a promise not to sue a wrongdoer if a wrong should be afterwards committed was illegal and void, an agreement not to sue entered into after a wrong had been already committed was competent (*Dig.* ii. 14, 27, 4).

[4] See for many further examples of impossible and illegal promises, Hunter, *Roman Law*, 4th ed., 598-601.

[5] See Part II., Chapter III., pp. 80-95.

[6] *Cf.* Justinian, *Inst.* iii. 15, 2-5; *Dig.* xlv. 1, 46 pr.; l. 16, 213; xlv. 1, 56, 4; xlv. 1, 115, 1; l. 15, 54; xlv. 1, 73 pr.; xiii. 4, 2, 6.

[7] The qualification or limitation of the promise in a contract with regard to the time, or to the place of performance, or by a condition is frequently signified by the term "modality."

[8] *Dig.* xlv. 1, 60; xli. 1, 41, 1; l. 17, 14.

render an actually immediate performance (other than a promise to pay money) impossible, and the law required that in such circumstances a reasonable time must be allowed by the creditor for performance. What is a "reasonable" length of time for performance depends upon and varies according to the nature of the contract and the circumstances of each case. Thus, for example, in the case of a building, the builder must be allowed the time that would be required by an ordinary or average builder,[1] and if any accident should occur to cause delay, such as fire, allowance must be made and a longer time be accorded.[2] Similarly, if two persons living in the same city were to agree that one was to pay to the other money at a place situated at a distance, what is a "reasonable" time to allow for the performance is a matter in the discretion of the Court, who will consider how long an averagely active man would take to cover the distance; the debtor is not to be required to go through storm and tempest, or to travel continuously by night and day; nor, on the other hand, is he entitled to linger on the way, but he must make such progress as might fairly be expected having regard to his age, the state of his health, and the season of the year. If, however, he should cover the distance and arrive sooner at his destination than might have been reasonably expected, the money would be due and exigible immediately upon his arrival.[3]

An express provision in a contract with regard to the time of performance was construed and applied strictly.

Until the time specially agreed upon and fixed for performance of the promise in the contract had arrived, no claim for performance could be made by the creditor; on the other hand, however, if the contract provided that performance should be demanded within a certain time, the promise could not be enforced and performance could not be demanded after the lapse of the specified period.

If the contract was one for the performance of an act—such as the building of a house—within a certain time, no action could be brought for failure to perform the act until the whole time had elapsed, even although, owing to delay, it was obviously impossible that the promise could be fulfilled within the stipulated time.[4]

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[1] *Dig.* xlv. 1, 137, 3.

[2] *Dig.* xlv. 1, 15.

[3] *Dig.* xlv. 1, 137, 2.

[4] *Dig.* xlv. 1, 124. This is the opinion of the jurist Papinian. There was considerable divergence of opinion between the jurists Ulpian, Marcellus, Pomponius, and Papinian with regard to the cases both of repairing and of building. It was contended that an action would lie if, by unreasonable delay, sufficient time had elapsed in which the building or the repairs might have been completed. (See *Dig.* xlv. 1, 72, 2; xlv. 1, 98, 1; xlv. 1, 14; and Hunter, *ut supra*, 586.)

If the time or day (*dies*) fixed for performance of the promise was one which must arrive in the ordinary and natural future course of events, the right of the creditor to demand performance was regarded as suspended or delayed until the time should have arrived; but in such a case the obligation or debt in respect of the contract was "due" as soon as the contract was made, although it was not exigible or enforceable, and performance of it could not be demanded until the arrival of the time fixed. When performance of a promise was thus suspended, the Roman Law signified the fact by the expression *Dies credit sed non venit*, which meant that the obligation under the contract had already begun to exist, but the time when performance of it could be demanded had not yet arrived.

(b) *Qualification of Promise as to Place of Performance.*—If there was in the contract an express provision as to the place where the promise was to be performed, such a qualification was strictly construed and performance could not be demanded elsewhere without ensuring that the debtor was not thereby prejudiced.

In some cases the place where performance is to take place is sufficiently indicated by the nature of the promise itself, or by the subject of the contract, without the necessity of any express provision or agreement upon the matter; so a promise to deliver an immovable had necessarily to be performed at the place where the immovable was situated; or a promise to repair a house required to be performed, of necessity, where the house stood. Where, however, there were no such indications, either expressed or clearly implied from the nature of either the promise or the contract, the creditor might demand performance wherever he could competently sue or bring an action against the debtor, or, in other words, within any jurisdiction to which the debtor was subject.[1]

(c) *Qualification of Promise by a Condition.*[2]—An obligation is conditional when the performance of it is made dependent upon some event both future and uncertain.[3] A condition in a contract may consequently be defined as some uncertain future event upon which the existence of the obligation is dependent.[4]

If the event upon which performance of the obligation was made

[1] *Dig.* xlv. 1, 137, 4. There is no Roman text with reference to the place where the debtor could compel the creditor to accept performance, but Savigny thinks that the debtor would have a freedom of choice corresponding to that enjoyed by the creditor (Hunter, *Roman Law*, 584).

[2] Justinian, *Inst.* iii. 15, 4; *Dig.* xlv. 1, 115, 1; l. 16, 54; xii. 1, 39; xlv. 1, 100. See upon conditions generally and their varieties, Hunter, *Roman Law*, 586-592.

[3] *Cf.* French Civil Code, Art. 1168.

[4] *Cf.* Cuq, *Institutions Juridiques des Romains*, ii. 360.

dependent was either already past or was present, the obligation might be either enforceable at once or be void. Thus, a stipulation might be qualified, "If Titius has been Consul," or "if Maevius is alive." If Titius was not consul or if Maevius is not alive the obligation was void, but if, on the contrary, Titius was consul or Maevius is living, the obligation was valid and immediately enforceable.[1]

In Roman practice conditions intended to qualify or limit the obligation were usually inserted in the contract at the time when it was entered into, but it was quite competent to insert or to add subsequently a condition if the parties mutually agreed, and such a subsequently-added condition in the form of an "added pact" (*pactum adjectum*) would modify the original terms of the obligation, and it might be pleaded by way of defence to an action for performance of the original terms of the contract. For example, if a creditor under a contract agreed subsequent to the date of the contract not to sue the debtor unless a particular contemplated event should occur, and he thereafter sued upon the original contract before the occurrence of the event and the consequent fulfilment of the condition upon which the existence of the obligation had been subsequently made dependent, he might be met by the debtor with the defence (*exceptio*) of either a subsequent agreement (*exceptio pacti conventi*) or bad faith (*exceptio doli mali*). As a further example, if a creditor under a contract agreed, subsequent to the completion of the contract, to discharge the debt owing to him under it if a contemplated event should happen, and the event having occurred, sought to enforce the contract, he could be met by the defence of a subsequent agreement or of bad faith.

The *exceptio pacti conventi* was thus a defence competent to a debtor, under a contract in respect of which he was entitled to plead that he was not bound to perform the obligation under the contract, because its original terms had been modified by a subsequent mutual agreement, or by a condition mutually assented to by the parties.

SECTION 107.—THE TIME OF PERFORMANCE (DIES)

The time or the date when a contractual obligation is to be performed or "solved," or, in other words, the time when performance or "solution" (*solutio*) is to take place, was expressed, in the Roman Law, by the term *dies* or "the day."

The time of performance of an obligation is ordinarily that agreed upon by the parties, and may be either present or future. If there was no express agreement as to the time of solution the Roman Law pre-

[1] Justinian, *Inst.* iii. 15, 6; *Dig.* xlv. 1, 100; xii. 1, 37-39.

sumed that present performance was intended to be, and the obligation was regarded as immediately exigible or enforceable.

The time of performance (*dies*) might be either (a) *ex die*, or (b) *in diem*. Performance was said to be *ex die* when it could not be demanded before a certain date, and it was *in diem* when it could not be insisted upon after a certain time.[1]

When a particular day (*dies*) was named for performance of the obligation under the contract there was said to be a *die certus* or "certain" or definite day; if, on the other hand, no particular day was specified, but it is, at the same time, certain that the day will come although uncertain when—such as, for example, the date of a person's death—the *dies* or time of performance was said to be *incertus* or indefinite.

There is an important distinction between an uncertain or indefinite time of performance (*dies incertus*) and a condition upon which performance of the promise is dependent. In the case of a *dies incertus* the uncertainty relates only to the actual time when performance can be demanded and take place, but that the time will come is not uncertain; in other words, it is certain that the "day" (*dies*) will come, but it is uncertain when it will actually arrive. In the case of a condition (*conditio*), however, qualifying a contract, and upon the fulfilment or "purification" of which the performance of the promise in the contract is dependent, it is not certain that the condition will ever be fulfilled, and it is, consequently, uncertain whether performance will ever become due and exigible.[2]

The Roman Law connoted the distinction between the time when an obligation begins to exist and the time when performance of the promise can be demanded by the expressions *dies cedit* and *dies venit* respectively. The time when an obligation begins to exist and the time when it becomes enforceable are entirely distinct points, although in certain circumstances they may happen to synchronise; an obligation may be long existing and due but not yet enforceable.

This distinction appears clearly in the following sets of circumstances:—

(a) *Unconditional Contract and no Time Fixed for Performance.*—The obligation is here enforceable as soon as it begins to exist; *dies cedit* and *dies venit* together.

(b) *Unconditional Contract, but a Time Fixed for Performance.*—In such a case the obligation would begin to exist—*i.e. dies cedit*—as soon as the

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[1] *Dig.* xliv. 7, 44, 1.

[2] See upon a fulfilment of a condition, and upon varieties of conditions, *post*, p. 321.

contract is made, but performance could not be demanded until the time fixed had arrived.

(c) *Conditional Contract but no Time Fixed for Performance.*—In this case no obligation would begin to exist unless and until the condition had been fulfilled, but as soon as that event happened the obligation becomes not only existent and due, but also enforceable at the same time.

(d) *Conditional Contract and a Time Fixed for Performance.*—The obligation comes into existence—i.e. *dies cedit*—in this case only if and when the condition is fulfilled, but performance cannot be demanded until the time has arrived (*dies venit*).

In the law of wills and succession *dies cedit* signified the point of time at which the right accrued to a legatee, while *dies venit* signified the time when the legacy was payable.

SECTION 108.—FULFILMENT OF A CONDITION IN A CONTRACT[1]

A condition in a contract is fulfilled or "purified" in either of two sets of circumstances, namely, (*a*) when the event upon which the promise was made conditional has happened; or (*b*) when the person who made the promise has prevented from occurring the event upon which performance of the promise was made conditional. The latter case, however, must be clearly distinguished from that of something happening quite independently of the act or will of the promiser which prevents the fulfilment of the condition; in such a case the contract would be of no effect.

When a condition is fulfilled its effect is retroactive, and dates back the commencement of the obligation to the time when the contract was made, so that it did not merely begin at the time of the fulfilment of the condition.[2] Thus the legal capacity of the person giving the promise is determined as at the time of making the promise and not at that when the condition is fulfilled.

SECTION 109.—VARIETIES OF CONDITIONS

Conditions are either "resolutive" (*resolutiva*) or "suspensive" (*suspensiva*).[3]

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[1] *Cf.* Cuq, *Institutions Juridiques des Romains*, ii 365.

[2] *Cf.* French Civil Code, Art. 1179; Cuq, *ut sup.*

[3] *Cf.* French Civil Code, Art. 1168. This distinction was appreciated by the Roman jurists, although they did not employ these particular terms to connote it (see *Dig.* xviii. 2, 2 pr.). Conditions are also, in modern usage, termed (*a*) *fortuitous* (Fr. *casuelle*), (*b*) *potestative*, and (*c*) mixed. A "fortuitous" condition is one dependent upon chance alone, apart altogether from the will of either creditor or debtor. A "potestative" condition is one the fulfilment of which is within the power of the

(a) *Resolutive Condition.*[1]—A resolutive condition is one which, if and when fulfilled, resolves or ends rights already acquired under a completed contract; in other words, there is a completed contract, but it is liable to be ended by the occurrence of an uncertain future event. Thus in a contract of sale subject to a resolutive condition the buyer became, on delivery of the property sold,[2] the owner of it, subject, however, to a liability to be divested of his rights under the contract by the happening of the event upon which the continuance of his rights had been made conditional.[3]

> Thus, for example, *A.* sells something to *B.*, but upon the condition that if the latter should change his mind (or some other uncertain event should happen) within a certain time the sale should be off.[4] In such a case the contract of sale would be complete and the buyer would have been vested with the ownership of the property, subject, however, to a possible liability to retransfer the property to the former owner if the contemplated event should have occurred. If the buyer refused to retransfer the ownership of the property to the seller on the fulfilment of the resolutive condition, the latter could not sue him as owner by a *vindicatio*, because the effect of the fulfilment of the condition was only to end the contract and did not divest the buyer of the ownership, but merely in the capacity of a seller by an ordinary action on the sale (*actio ex vendito*).[5] A *vindicatio* was the remedy available only to an owner claiming his property from the unlawful possession of another person, and in the case figured above the seller had ceased to be the owner by reason of his transference of the *dominium* to the buyer when the contract was completed.[6]

(b) *Suspensive Condition.*[7]—A "suspensive" condition is one which suspends or delays the commencement of the obligations and the rights created by the contract until the happening of the contemplated event; consequently, failing the fulfilment of the condition, no completed contract has existed. In a contract of sale, for example, that is qualified by a suspensive condition, the buyer would not acquire the owner-

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person who is to conditionally acquire the right. A "mixed" condition is one that is dependent on the will of one of the parties to the contract and partly on the will of a third party (*cf.* French Civil Code, Arts. 1169-1171; Mackenzie, *Roman Law*, 7th ed., 207, note 2).

[1] *Cf.* French Civil Code, Arts. 1183, 1184.

[2] See "Sale (*Emptio-venditio*)," *post*, p. 365.

[3] There was, in such a case, what was expressed by the Roman jurists as a *pura emptio quae sub conditione resolvitur* (cf. *Dig.* xviii. 2, 2 pr.).

[4] Cf. *Dig.* xviii. 1, 3.

[5] *Dig.* xviii. 5, 6; *Code*, iv. 54, 3.

[6] Examples of resolutive conditions are chiefly concerned with the contract of sale, and their importance is confined to the question of ownership (Hunter, *Roman Law*, 4th ed., 590; see also Girard, *Manuel de Droit Romain*, 5th ed., 720-721).

[7] See on suspensive conditions, Girard, *ut sup.*, 472 *et seq.*; *cf.* also French Civil Code, Arts. 1181, 1182.

ship (*dominium*) of the thing sold unless and until the condition is fulfilled, and, unlike a buyer under a resolutive condition, who by the completion of the contract becomes the owner,[1] he could neither acquire a prescriptive right to the property nor claim to enjoy the fruits.[2]

> Thus, if *A.* agrees to sell property to *B.* upon condition that the contract will hold good if he shall not have received a better offer for it within a fixed time thereafter, such condition would be suspensive of the completion of the contract, and of the rights and duties under it, which would only come into existence upon the expiry of the time fixed without a better offer having been made.[3]
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> It will be observed from what has preceded that "suspensive" conditions were conditions precedent and "resolutive" conditions were conditions subsequent.

SECTION 110.—IMPOSSIBLE AND ILLEGAL CONDITIONS

Conditions qualifying or limiting the terms of a contract require to be both (*a*) legal and (*b*) possible.[4] A condition was not bad, and did not void a contract, according to the Roman Law, merely because it happened to be foolish or unreasonable, but if the condition amounted to either illegality or to physical impossibility its effect was to invalidate the contract.

Illegal Condition.—There is an illegal condition when performance of the obligation is made dependent upon an act or event that is forbidden by the law.

Impossible Condition.—A condition is impossible if from the very nature of things it cannot be fulfilled, as, for example, if a man stipulated for a certain sum if he should touch the sky with his finger, or if he should, without any adventitious scientific aid, fly from one mountain top to another, and contracts qualified by such conditions would be invalid.[5] But the converse of such a condition, a promise to pay money if another person should not do some impossible act, was not invalid, and was regarded as an unconditional undertaking fulfilment of which could be at once demanded.[6]

An impossible condition attached to a legacy or gift given in a will or testament, by reason of the special favour with which wills were regarded by the Roman Law, and its strong inclination in favour of

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[1] *Dig.* xviii. 2, 2, 1.

[2] Cf. *Dig.* xviii. 2, 4 pr.

[3] *Dig.* xviii. 2, 2 pr. See upon what constitutes a "better offer," *post*, p. 324.

[4] *Cf.* French Civil Code, Art. 1172.

[5] *Dig.* xlv. 1, 7 ; Justinian, *Inst.* iii. 19, 11 ; Gaius, *Inst.* iii. 98.

[6] Justinian, *Inst.*, *ut sup.* ; *cf.* French Civil Code, Art. 1173.

testacy wherever such a construction was possible, was regarded as if it had not been written (*pro non scripto*), and, although there was some controversy upon the matter amongst the Roman jurists,[1] such a condition was generally considered not to invalidate a legacy.[2]

SECTION 111.—SPECIAL FORMS OF CONDITIONAL CLAUSES IN CONTRACTS[3]

(a) *In Diem Addictio.*—In the contract of sale a clause of *in diem addictio* was one providing that if a better offer was made to the seller within an agreed upon time, he was to be entitled in his option to regard the contract as ended and to be free from any liability under it.[4]

Such a clause in the ordinary case, and in the absence of either any express or any clearly implied intention otherwise of parties, was suspensive of the rights and obligations under the contract; but it might equally well be from its terms resolutive, and whether it was to be regarded as one or the other depended upon the real intention of the parties, who might have in view either (*a*) that the sale was to be at once complete but liable to rescission in the event of a better offer being actually made, in which case the condition was resolutive; or (*b*) that the sale should not be complete until the expiry of the time fixed, when only it would and could be known whether there were any better offers, in which case the condition was suspensive.[5]

A "better offer" was either (*a*) an actual higher price, or (*b*) more speedy payment or payment at a more convenient place, or (*c*) better security for payment, or (*d*) generally more favourable terms for the seller, offered within the time fixed, by a genuine (*bonâ fide*) intending buyer.[6]

If a genuine "better offer" was made the seller was bound to give the first buyer notice of it in order that he might have an opportunity of making as good an offer and so to retain the property;[7] if the buyer declined to make as good an offer the seller was bound to accept the new offer.[8]

If the first buyer was in the enjoyment of the property at the time when the better offer was made and accepted, he was bound to deliver

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[1] Gaius, *Inst.* iii. 98.

[2] Justinian, *Inst.* ii. 14, 10; *Dig.* xxviii. 7, 1.

[3] *Cf.* Girard, *Manuel de Droit Romain*, 5th ed., 720, 721; see Hunter, *Roman Law*, 590.

[4] Cf. *Dig.* xviii. 2, 1; xviii. 2, 2 pr.

[5] *Dig.* xviii. 2, 2 pr.

[6] *Dig.* xviii. 2, 4, 5-6.

[7] *Dig.* xviii. 2, 8.

[8] *Dig.* xviii. 2, 7; xviii. 2, 9.

up to the seller any unconsumed fruits and produce (*fructus*)[1] of the subject,[2] and to deliver the thing sold to the new purchaser;[3] but he was at the same time entitled to claim from the seller any expenses or outlays incurred by him that were beneficial to the property and likely to increase its value.[4]

As between the former and the new buyer, however, there was no contractual relation whatever, and the former's claim for either expenses or repayment of the purchase price was against the seller alone.[5]

(b) *Lex Commissoria.*[6]—This was a special form of resolutive condition which provided that if the obligation contained in the contract was not performed within or by the time agreed upon, the contract was to be held as voidable. Such a clause was most usually employed in the contract of sale, but it was also used in the contracts of hire (*locatio-conductio*) and pledge (*pignus*).[7]

As applied to the contract of sale there was a *lex commissoria*[8] in these cases where it was specially agreed by the parties that if the whole price was not paid within or by the time fixed in the contract the sale was to be rescinded at the option of the seller.[9]

In order that a *lex commissoria* in a contract of sale should operate three elements were essential, namely, (1) a time must have been fixed within which the whole price was to be paid; (2) the whole time fixed must have elapsed; and (3) some portion of the price must remain unpaid at the termination of the period agreed upon.

A contract of sale qualified by a *lex commissoria* was good from the beginning or the time when it was made (*ab initio*), but, by reason of the resolutive condition attached to it, it was liable to be rescinded; the mere fulfilment of the condition, however, by the buyer's failure to

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[1] See, upon what constitutes "fruits" of a subject, *ante*, Part III., Section 74, p. 227, and Section 91 (b), p. 262.

[2] *Dig.* xviii. 2, 6 pr.

[3] *Dig.* xviii. 2, 14, 4.

[4] *Dig.* xviii. 2, 16.

[5] *Dig.* xviii. 2, 20.

[6] See *Dig.* xviii. 3; Hunter, *Roman Law*, 4th ed., 591; Mackenzie, *Roman Law*, 7th ed., 226 and 239; Girard, *Manuel de Droit Romain*, 5th ed., 721.

[7] See Mackenzie, *Roman Law*, 226; Sohm, *Institutes of Roman Law*, 3rd ed., 353 and 356. As applied to pledge the *lex commissoria* might constitute a condition that the thing pledged should become the absolute property of the creditor if the debt was not paid at the time agreed upon. Such a condition in the contract of pledge was declared void by a Constitution of the Emperor Constantine in A.D. 326, as it was found to operate a hardship and injustice (*Code*, viii. 35).

[8] Or, otherwise, *pactum legis commissoriae.*

[9] *Dig.* xviii. 3, 8; *Code*, iv. 54, 1. In such a case the seller was entitled to retain any "earnest-money" that might have been delivered to him.

pay by the time fixed did not of itself (*ipso facto*) void or end the contract; it merely gave to the seller the right to rescind it if he should choose to do so. The option or alternative of the seller under a *lex commissoria* was either (*a*) to hold the sale as ended, or (*b*) to hold the sale as still existing and binding, and to sue the buyer for the unpaid balance of the price.[1]

The seller's choice was not dependent upon his having previously demanded payment upon the expiry of the period fixed, but it vested in him, *ipso facto*, by the lapse of the time. When, however, the seller had once exercised his option, and had elected or chosen between ending the contract and holding it as still binding, he was thereafter bound by his choice, and could not go back upon it.[2]

If the seller had accepted a portion of the purchase price after the lapse of the period had entitled him to demand the whole price, he was regarded as having thereby tacitly and impliedly chosen to hold the contract as good and still binding, and his only remedy thereafter was to sue the buyer for payment of the balance of the contract price.[3]

The *lex commissoria* required to be expressly agreed upon by the parties, and was never presumed; consequently, in the absence of such a clause, a seller was not entitled to regard the contract as no longer binding merely by reason of the buyer's failure to pay; his only right and remedy, in such circumstances, was to sue the purchaser for the price, or its balance, and for damages for breach of contract.[4]

It was usual, in Roman practice, to make the buyer expressly liable, under the *lex commissoria*, to the seller for any loss that the latter might suffer on account of the buyer's failure to pay by the time agreed upon necessitating a second and less advantageous sale to another purchaser.[5]

It will be observed that the clauses of *addictio in diem* and *lex commissoria* are special "added pacts" (*pacta adjecta*) for the benefit of one of the parties; and as applied to the contract of sale they were inserted for the benefit of the seller. Certain special conditional clauses, however, were frequently attached to the contract of sale for the benefit of the purchaser, with a view to relieving him from liability

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[1] *Dig.* xviii. 3, 2.

[2] *Dig.* xviii. 3, 4, 2; l. 17, 75.

[3] *Dig.* xviii. 3, 6, 2.

[4] *Cf.* French Civil Code, Art. 1184. By French law there is implied in all bilateral contracts a condition dissolving the contract if one of the parties does not fulfil his promise; but the dissolution does not operate, *ipso facto*, upon failure to perform. The other party has the option either to insist upon fulfilment (when that is possible) or to dissolve the contract; but in the latter case the dissolution requires to have judicial sanction.

[5] *Dig.* xviii. 3, 4, 3.

under the contract when after reasonable examination and trial he was not satisfied with the thing sold; such special conditional clauses are most usually found in the form of either *emptio ad gustum* or *pactum displicentiae.*

(c) *Emptio ad gustum* was, literally, "a purchase to taste," and signified a sale made dependent upon the satisfaction of the buyer; it was, in other words, what is known, in modern commercial usage, as a sale "on approval." It might be either resolutive or suspensive. Thus in a sale to the effect "If the property suits you, within a certain time it will be purchased by you at such a price,"[1] the condition would be suspensive; the converse case, however, would be a resolutive condition as if it were agreed to the effect "If within a certain time you find that the property does not suit you, let it be considered that you have not bought it."[2]

In the case of a suspensive *emptio ad gustum* the seller was bound to sell the property to the buyer at the price fixed if and when the purchaser expressed his satisfaction with it; and until then the seller was conditionally bound to the effect and extent of being precluded from selling the thing to any other person so long as the condition remained unfulfilled; but the purchaser was in no way bound until he had expressed his satisfaction, and the condition had been thereby fulfilled.

In the case of a resolutive *emptio ad gustum* the contract was complete and binding from the moment when it was made, but was liable to be ended or "resolved" if the buyer intimated his dissatisfaction with the property, after a fair examination or trial of it, either within the time agreed upon, or, failing a fixed time, within what would amount, in all the circumstances, to a reasonable time.

(d) *Pactum Displicentiae.*—This was a special form of resolutive condition in the contract of sale, inserted for the benefit of the buyer, in respect of which he was to be entitled to rescind the contract, at his option, by actually returning the property to the seller, and not, as in the *emptio ad gustum*, by merely intimating his dissatisfaction with, and rejection of it, and the seller was correspondingly bound to take the property back.

The Aedilician Edict provided that the property must be returned within sixty days if no time had been fixed in the contract under this special pact.

Other special conditional clauses frequently inserted in contracts of sale were (*a*) a clause of "pre-emption"; (b) the *pactum de retro-vendendo*; and (c) the *pactum de retro-emendo.*

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[1] Justinian, *Inst.* iii. 23, 4. *Cf.* Gaius, *Inst.* iii. 146.

[2] *Dig.* xli. 4, 2, 5.

(e) *Prae-emptio.*—A clause of "pre-emption" is one by which either (*a*) a seller reserves to himself the right to the first opportunity to re-purchase the property if the buyer should afterwards desire to sell it, or (*b*) in respect of which the buyer is bound not to sell the property to anyone except the seller.[1]

(f) The *Pactum de retro-vendendo,* or, literally, "the agreement concerning selling back," was a pact to the effect that the buyer was to be bound to re-sell the property to the seller, and to take back the price paid for it, if the seller should wish to redeem the property within a fixed time.[2] This conditional clause sometimes took the form of an agreement, for the special benefit of the buyer, to the effect that the seller should be bound to buy back the property if the buyer should require him to do so within a fixed time; in this form the clause was known as the (g) *pactum de retro-emendo,* or literally, "the agreement concerning buying back."

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[1] *Dig.* xviii. 1, 75; xix. 1, 21, 5.

[2] See Girard, *Manuel de Droit Romain,* 5th ed., 721; Mackenzie, *Roman Law,* 7th ed., 239.

CHAPTER VII

The Theory of Responsibility for Fault

Section 112.—Fault (Culpa) and Diligence (Diligentia)[1]

The consideration of "fault" and of "diligence" arises with reference to the responsibility that is created and put upon either or both of the parties to a legal obligation.

In the performance of a contract, loss or damage (*damnum*) might be caused to one of the parties to the contract by the other party either intentionally or unintentionally omitting to do something that the obligation required him to do (*culpa in omittendo*), or by him doing something that in the performance of the contract he ought not to have done (*culpa in committendo*).

By the Roman Law every person was liable for wilful wrongdoing or loss caused in the course of the execution of the contract, and a party who in such a way caused loss or harm to the other party to the contract was regarded as guilty of *dolus*, and was liable to make good the malicious injury so caused. No person could escape this liability for wilful wrongdoing by any form of agreement, and any special convention that had as its object the exemption of the parties from such liability was void.[2]

Every agreement or contract *ipso facto* subjected the parties to an implied obligation to make good injury caused either wilfully by *dolus*, or unintentionally through *culpa*. A party to an obligation was said to be guilty of *culpa* or "fault" if, without any intention on his part to do so, and apart from inevitable accident, he caused injury or loss (*damnum*).

Dolus thus signified intentional wrongdoing, whereas *culpa* was unintentional injury caused by negligence or lack of sufficient care in the performance of the obligation; the care which the law required on

[1] See Sandars, *Institutes of Justinian*, 8th ed., 323-325; Muirhead, *Roman Law*, 7th ed., 208-211; Sohm, *Institutes of Justinian*, 3rd ed., 368-371; Poste, *Institutes of Gaius*, 4th ed., 429, 430; Buckland, *Principles of Roman Private Law*, 289-292; Girard, *Manuel de Droit Romain*, 5th ed., 652 *et seq.*; May, *Éléments de Droit Romain* 8th ed., 387-389.

[2] *Dig.* ii. 14, 27, 3; xiii. 6, 17. The technical expression signifying the liability to make good malicious injury or wilful wrongdoing was *praestare dolum;* and, similarly, the responsibility for unintentional loss caused by fault (*culpa*) or lack of care was signified by the term *praestare culpam.*

account of the responsibility created and placed upon the parties by the obligation was known as *diligentia* or "diligence."

> In the Roman Law the degree of responsibility created by an obligation was usually estimated in terms of diligence, but it is equally competent to measure the responsibility of persons bound by an obligation by the degree of fault (*culpa*) for which the law will hold them responsible; or, in other words, by the amount of negligence (*negligentia*) or lack of "diligence" (*diligentia*) that is implied by the degree of fault present.
>
> *Diligentia* was thus the care which the law required that a party to an obligation required to show in the performance of the duties involved in the contract, and with regard to the matter or property dealt with in the contract; but the liability or responsibility of parties for lack of sufficient "diligence," or, otherwise, for "fault," varied in degree.

Diligence (*diligentia*) or care was of two degrees; the higher degree was known as "exact" diligence (*exacta diligentia*), and was the amount of care which a prudent man of business (*bonus paterfamilias*) would employ, while the lower degree was "ordinary," or the amount of care which a man of average, but not exceptional, prudence would use in the management of affairs. The higher degree of diligence was an absolute standard, but the lower degree was relative, for it considered merely the amount of care which the particular careless person was accustomed to show in the management of his own affairs,[1] which necessarily varied in the case of different individuals, so that what was "fault" (*culpa*) in one person might not be so in another.

Just as *diligentia* or care in the performance of the obligation was of two degrees, so was *culpa* or lack of care.[2] If the fault was so extreme that no person of reasonable intelligence, having in view the probable consequences, would have committed it, it was known as *culpa lata*,[3] and such an extreme degree of fault was regarded as practically equivalent to *dolus*, upon the assumption that such egregious carelessness could only have been committed intentionally; if the fault was not extreme it was known as *culpa levis;* but *culpa levis* varied in degree according as the standard of diligence desiderated was either the absolute one of "the prudent man of affairs" (*bonus paterfamilias*), who would employ the utmost possible care to avoid injury, or the relative one of the man of

[1] *Quanta in suis rebus diligentia* (*Dig.* xvi. 3, 32).

[2] See Mackenzie, *Roman Law*, 7th ed., 208-210, upon the controversy as to the recognition by the Roman Law of three degrees of fault, namely, *culpa lata*, *levis*, and *levissima*, and see also Poste, *Institutes of Gaius*, 4th ed., 430, and Girard, *Manuel de Droit Romain*, 5th ed., 656, note 2.

[3] *Dig.* l. 16, 213, 2: *Lata culpa est nimia diligentia, id est, non intelligere quod omnes intelligunt.*

average discretion in the management of his own affairs; the first case involved a failure to show "exact" diligence, while the second involved a failure to employ "ordinary" or average care (*diligentia*).

Modern jurists distinguish between these two degrees of *culpa levis* by the use of the terms *culpa levis in abstracto* and *culpa levis in concreto;* in those cases in which the standard of diligence set up was that of "the prudent man of business," a failure to attain that absolute standard has been styled by these jurists *culpa levis in abstracto*, but where the standard of care desiderated was merely the relative one of the particular indidividual guilty of *culpa* in the management of his own affairs, the failure to attain that standard has been correspondingly styled *culpa levis in concreto.*

"Exact" diligence, or the utmost possible care, was required by the law, and a person was consequently liable for *culpa levis in abstracto*—(1) When the contract was one entirely for his benefit, such as the "commodatary" in the contract of "commodate";[1] (2) when the contract was for the mutual benefit of both parties,[2] as in the contracts of sale,[3] hire,[4] or mortgage; and (3) when a person voluntarily undertook a trust, as in the contract of mandate,[5] and in the quasi-contract known as *negotiorum gestio.*[6]

"Ordinary" or average diligence was required by the law, and a person was consequently liable only for *culpa levis in concreto* in those cases—(1) Where the benefit of the contract was wholly with the other contracting party, as, for example, the depositary (*depositarius*) in the contract of "deposit" (*depositum*),[7] when it must be proved that the depositary has been guilty of "crass" or extreme carelessness (*crassa negligentia*) by failing to show as much care as he ordinarily employs in his own affairs (*quanta in suis rebus diligentia*);[8] (2) where both parties had a common interest in the thing as to which the question of diligence or negligence arose, such as partners in the contract of partnership (*societas*),[9] or the husband in the management of the dotal property, in which respect he was a sort of partner,[10] co-heirs, and legatees;[11] (3) where

[1] See *post*, p. 339.

[2] *I.e.* when both parties have a common interest in the obligation being performed, but there is no joint interest in the thing.

[3] *Dig.* xviii. 6, 3.

[4] *Dig.* xix. 2, 25, 7.

[5] Justinian, *Inst.* iii. 26; *Dig.* xvii. 1. See *post*, p. 401.

[6] See Justinian, *Inst.* iii. 27, 1; *Dig.* iii. 5.

[7] Justinian, *Inst.* iii. 14, 3; *Dig.* xliv. 7, 1, 5. See also *Dig.* xvi. 3, and "Contract of Deposit," *post*, p. 342.

[8] *Dig.* xvi. 3, 32.

[9] See *post*, p. 394.

[10] *Dig.* xxiii. 3, 17.

[11] *Dig.* x. 2, 25, 16.

the obligation was created by law and not by agreement, or where, otherwise, parties were involuntarily bound by a quasi-contract, as in the cases of tutors and curators.[1]

It will thus be seen that, in any particular contract, in proportion to the slightness of the degree of responsibility or liability for fault, the greater was the amount of fault necessary in order to render a person liable; in other words, if the responsibility imposed upon a person by the special character and circumstances of a particular form of obligation was only of a slight degree, he would only be liable for serious fault (*culpa lata*) or extreme negligence (*crassa negligentia*), so gross as to be practically equivalent to *dolus* or wilful wrongdoing; and correspondingly in the converse case.

A person who was only liable for *culpa lata* or extreme carelessness was not held liable unless it could be proved against him, by those making the allegation of fault, that he had actually failed to use as much care as he ordinarily did in the management of his own affairs; but a person who was liable for *culpa levis in concreto* had placed upon him the burden (*onus*) of proving that, in the matter of the contract, he had exercised as much care as he ordinarily employed with regard to his own concerns.

A person who was responsible for *culpa levis in abstracto* required to show that he had actually employed such a high degree of care as "the prudent man of business" who, by reason of his attainment of such absolute standard, was entitled to be styled a *bonus paterfamilias*.

Just as "diligence" or care was either (*a*) special (*exacta*), or (*b*) average, so negligence or carelessness might be either (*a*) gross or extreme (*crassa*) or (*b*) slight (*minima*). When there had been *crassa negligentia* it signified that the person guilty of it had not conformed to the absolute standard of care, while *minima negligentia* indicated that in the matter of the contract the person had not shown the same amount of care as he usually employed in his own affairs.

SECTION 113.—CONSTRUCTIVE FAULT

Fault (*culpa*) might be committed constructively by mere delay (*mora*) if a person failed to perform the obligation within a reasonable time.[2] The determination of what constitutes unreasonable delay in the performance of an obligation depends upon the circumstances of each particular case, and cannot be absolutely fixed.

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[1] *Dig.* xxvii. 3, 1, pr.

[2] When delay (*mora*) amounted to *culpa*, it usually involved a liability to pay interest (*usurae*) (*Dig.* xxii. 1, 7). See upon the Roman Law as to payment of interest generally, Mackenzie, *Roman Law*, 7th ed., 218.

CHAPTER VIII

The "Real" Contracts[1]

It has been already stated[2] that, according to Justinian, the obligations arising *ex contractu*, or out of express agreement, were included within four great classes, namely, (1) "Real" (*re*), (2) "verbal" (*verbis*), (3) written or "literal" (*litteris*), and (4) "consensual" (*consensu*). The contracts *verbis* and *litteris* have been already sufficiently explained,[3] and we now proceed to consider in some detail these obligations arising *ex contractu* that were included within either the "real" or the "consensual" contracts, since these are of the utmost importance from the modern standpoint.

Contracts *re*, or "real" contracts, were introduced into the Roman system through the Praetorian Edict upon equitable grounds and in order to obviate the inconvenience or the injustice that was increasingly frequently found to be entailed by the necessity for a close adherence to the rigid technical forms of the strict *jus civile*.

The "real" contracts were those which were constituted *re* (literally, "by a thing"), by the intervention of a *res* or "thing" in the form of some act or fact; the act or fact which had the effect of constituting such contracts was the delivery of something by one person to another with the intention, at the same time, of thereby imposing duties upon the person to whom the property was delivered.

Justinian included four different kinds of contracts within the category of contracts *re*, namely, (1) *Mutuum;* (2) commodate (*commodatum*); (3) deposit (*depositum*); and (4) pledge (*pignus*).[4]

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[1] See on the "real" contracts generally, Cuq, *Institutions Juridiques des Romains*, ii. 380-399; Hunter, *Roman Law*, 4th ed., 471-482; Moyle, *Institutes of Justinian*, 4th ed., 392-398; Mackenzie, *Roman Law*, 7th ed., 215-229; Sandars, *Institutes of Justinian*, 8th ed., 327-332; Poste, *Institutes of Gaius*, 4th ed., 323-330; Girard, *Manuel de Droit Romain*, 506-532; May, *Éléments de Droit Romain*, 8th ed., 258-273; Sohm, *Institutes of Roman Law*, 3rd ed., 375-382.

[2] *Ante*, pp. 290 and 294.

[3] See *ante*, pp. 295 and 296.

[4] These are known as the "nominate" real contracts, as distinguished from those other contracts that were also created *re*, and enforced upon the principle of part performance, but which were not included within this special category, and which are consequently known as the "innominate" real contracts (see *ante*, p. 299; also Sohm, *Inst.*, 3rd ed., 375).

SECTION 114.—THE CONTRACT OF MUTUUM[1]

This was a form of the contract of loan. It was the gratuitous loan of fungibles;[2] expressed otherwise, it was a loan, either simple or conditional,[3] without any consideration, of things that were intended to be and which were naturally consumed in the course of their ordinary use. *Mutuum* was thus the gratuitous loan for consumption of "fungibles" or such things as are generally estimated by weight, number, or measure, as wine, oil, corn, metal, money, fruit, and such like.[4]

The essential characteristic of the contract of *mutuum* was that it was qualified by a condition, which did not require to be expressed, that the borrower should restore to the lender at the time agreed upon, an amount of property equivalent to that lent, and of the same kind and quality.[5]

It was also characteristic of the contract of *mutuum* that the ownership (*dominium*) of the thing lent passed to the borrower, for his right was to consume the property lent and so cause it to cease to exist; only an owner could contract *mutuum*, for the lender's duty was to make the thing lent the property of the borrower, so that he could lawfully consume it.[6]

(1) *Borrower's Liability under the Contract of Mutuum*

The borrower, in virtue of the completion of the contract by the delivery to him of the property by the owner, immediately acquired thereby the ownership of the thing, and at the same time came under an obligation to restore to the lender property of the same kind as he had received, and equal in quantity and quality, but not to restore the identical thing. It was not necessary that the borrower should expressly promise to restore as good as he got, for such an undertaking was implied in the contract.

The borrower, in the absence of express agreement otherwise, could not fulfil his obligation by giving or tendering some kind of thing other

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[1] See on contract of *mutuum*, Hunter, *Roman Law*, 4th ed., 472 *et seq.*; Mackenzie, *Roman Law*, 7th ed., 217; Girard, *Manuel de Droit Romain*, 5th ed., 507-519; Poste, *Institutes of Gaius*, 323; Sohm, *Institutes of Justinian*, 3rd ed., 375, 376; Buckland, *Principles of Roman Law*, 238, 239; Cuq, *Institutions Juridiques des Romains*, ii. 381-391.

[2] See on "Fungibles and Non-fungibles," *ante*, Part III., Section 67 (d), p. 200.

[3] *Dig.* xii. 1, 7; xii. 1, 8.

[4] See Justinian, *Inst.* iii. 14 pr.; Gaius, *Inst.* iii. 90; *Dig.* xii. 1 pr., 1, 2; *Code*, iv. 1. *Cf.* French Civil Code, Art. 1874, and Arts. 1892-1904.

[5] *Dig.* xii. 1, 3. *Cf.* French Civil Code, Art. 1892.

[6] *Dig.* xii. 1, 2, 4. The other "real" contracts, however, could be created by a person who was not the owner, but merely a possessor (see *post*, p. 335).

than that lent, although equivalent in value,[1] as, *e.g.*, money for wine, or cloth for corn, or oil for fruit. If the property lent was money, the borrower, in order properly to perform his obligation, required to restore the same amount of money, but not the actual coins lent.

The liability of the borrower under the contract of *mutuum* to restore the same kind of thing lent, and equal in both quantity and quality, was quite irrespective of the fact whether or not the market value of the commodity had risen or fallen between the time of the making of the contract and of the performance of his obligation. If the property lent under the contract of *mutuum* suffered damage or destruction the loss fell upon the borrower, because, from the very nature of the contract, the ownership (*dominium*) of the thing lent passes to him on the completion of the contract by delivery, and notwithstanding the deterioration or the destruction of the subject the borrower remained liable for its value, for which the lender was, by the contract, merely a creditor.[2]

It was essential to the proper constitution of the contract of *mutuum* that the property should either have been actually delivered to the borrower, or be in his possession before the making of the contract.[3]

(2) *Borrower's Rights under the Contract of Mutuum*

The borrower acquired by the contract all the rights of an owner, as distinguished from a mere possessor; but, since rights of *dominium* or ownership can only be acquired from one who is himself the actual owner—for no one can transfer a title to property higher than that which he himself possesses — it follows that only the true owner (*dominus*) could competently lend property in *mutuum*, although a mere possessor might validly deliver property and create rights and duties under any of the other real contracts.[4]

Neither a consideration nor interest was payable under the contract of *mutuum*, because it was essentially gratuitous, and neither of these fell within the obligations incidental to the contract; but, nevertheless, interest (*foenus* or *usurae*)[5] might be expressly agreed upon by the

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[1] *Dig.* xii. 1, 2 pr.

[2] The action by which the lender could recover the equivalent of the property lent was the *condictio certi* or *incerti*, according as the *quid*, *quale*, or *quantum* to be recovered was determinate or indeterminate. Sometimes the term *condictio ex mutuo* or the *actio mutui* (*Code*, vii. 35, 5) was employed. The *condictio certi* was strictly a personal action for the meaning of a definite sum of money (*certa pecunia*). *Cf.* Mackenzie, *ut sup.*, 217, note 3; Sandars, *Institutes of Justinian*, 328.

[3] *Dig.* xii. 1, 9, 9.

[4] *Dig.* xii. 1, 2, 4.

[5] See upon interest in the Roman Law, Mackenzie, *Roman Law*, 7th ed., 218, 219.

parties either by a formal stipulation,[1] or in a few exceptional cases by a mere pact (*pactum*) or informal agreement.[2] In such cases, however, the obligations to make good the loan, and the undertaking to pay interest upon, or to give a consideration in respect of, the loan were quite distinct and separate from the obligations necessarily incidental to the contract itself.

(3) *Special Restriction upon the Contract of Mutuum*

The contract of *mutuum* was subject to a special restriction in respect of which persons *in potestate* could not competently obtain a loan of money without the knowledge and consent of the *paterfamilias*. This restriction was operated by the provisions of the *Senatus-Consultum Macedonianum*, which was passed sometime between 41 A.D. and 79 A.D.[3] The object of this statute was to prevent a *filiusfamilias* from borrowing money on the strength of his expectations from his father, and being thereafter tempted, on pressure of his creditors, to attempt the life of his parent.[4] This statute did not either directly forbid loans of money to a *filiusfamilias* without his father's consent, or declare such loans to be null and void, but it attained that result indirectly by refusing to the lender an action, or other legal means, to recover money so lent. But such loans, nevertheless, created a "natural" obligation, and if paid they could not be reclaimed under a *condictio indebiti* or an action for money not owing.[5] The *Senatus-Consultum* only applied to loans of money, but in other respects left the capacity of persons under *potestas* to contract perfectly unaffected;[6] so that a son could buy or sell, or let or hire, and if the obligations created by these means were changed into a *mutuum* the latter would be valid,[7] unless the sale or the hire was merely intended to evade the provisions of the statute.[8]

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[1] An informal agreement regarding interest was generally not enforceable unless subsequently embodied in a stipulation.

[2] Such as loans by municipalities (*Dig.* xxii. 1, 30), or loans of corn or fodder (*Code*, iv. 32, 12; *Nov.* 136, 4).

[3] According to Tacitus (*Ann.* xi. 13) this *Senatus-Consultum* was passed in the reign of Emperor Claudius (41-54 A.D.), and according to Suetonius (Vesp. 11) in the reign of the Emperor Vespasian (69-79 A.D.).

[4] Justinian, *Inst.* iv. 7, 7; *Dig.* xiv. 6, 1 pr.; xiv. 6, 3, 3; xiv. 6, 7, 10; *Code*, iv. 28. This statute derived its name, Theophilus says, either from a spendthrift young parricide called Macedo, or from a notorious usurer of the same name, whose actions had drawn attention to the dangers arising from such unchecked courses.

[5] *Dig.* xii. 1, 14.

[6] See on capacity of persons under *potestas*, *ante*, Part II., Section 16 (d), p. 93.

[7] *Dig.* xiv. 6, 33.

[8] *Dig.* xiv. 6, 7, 3.

Although a *filiusfamilias* could, in general, plead this law by way of defence to a claim for repayment, a surety might quite competently be bound and compelled to buy. Moreover, the statute did not apply, and it could not be pleaded as an "exception" by a *filiusfamilias* (1) if he had borrowed on the security of his *peculium castrense*, or *quasi-castrense*,[1] and to the extent of that;[2] (2) if he had, after becoming *sui juris*, either expressly, or by clear implication, ratified the loan, as by paying the whole or part of it;[3] (3) if the loan had been contracted with the father's consent, either directly[4] or indirectly,[5] as by payment of a part of the loan, or had been subsequently ratified by him;[6] (4) if the loan had been made for the benefit of the father's estate, and with the intention on the part of the son to make the father the real debtor;[7] (5) if the loan was proper, or necessary, as to pay a legal debt,[8] or to procure things necessary for the son's maintenance, education, or official duties, if abroad, such as his father was in the habit of providing;[9] (6) if the lender was reasonably mistaken as to the status of the borrower, and the error was not one in law.[10]

(4) *Special Form of Loan of Money* (*Pecunia trajectitia*,[11] *Nauticum foenus*)

The Roman Law placed in a special legal position, and dealt in a special way with, "maritime" loans, or loans of money given expressly for certain maritime or commercial purposes.

Money lent at interest for the specific purpose of purchasing merchandise, and thereafter shipping it to some destination oversea for sale or disposal, was known by the special name of *pecunia trajectitia*.[12] The risk of loss of or of injury to the goods or merchandise purchased with money so lent was with the lender until the goods arrived at their destination, because the lender was considered as having taken the risk of non-arrival into his consideration when agreeing to make the loan,

[1] See *ante*, Part II., Section 31 (b) and (c), p. 128.
[2] *Dig.* xiv. 6, 1, 3; xiv. 6, 2.
[3] *Code*, iv. 28, 2.
[4] *Dig.* xiv. 6, 2; *Code*, iv. 28, 4.
[5] *Dig.* xiv. 6, 7, 15.
[6] *Code*, iv. 28, 7.
[7] *Dig.* xiv. 6, 7, 12.
[8] *Dig.* xiv. 6, 7, 14.
[9] *Code*, iv. 28, 5; iv. 28, 1.
[10] *Dig.* xiv. 6, 3. See on the *Senatus-Consultum Macedonianum*, and the circumstances in which it did not apply, Moyle, *Institutes of Justinian*, 4th ed., 572, 573; Hunter, *ut supra*, 474; Girard, *Manuel de Droit Romain*, 5th ed., 518, 519.
[11] See Cuq, *Institutions Juridiques des Romains*, ii. 389.
[12] This is the modern "bottomry loan" (French, *prêt à la grosse*).

and in estimating the "maritime interest" (*nauticum foenus*) to be paid upon it in respect of the risk.[1] The borrower of *pecunia trajectitia* was not under any obligation to repay the loan until the goods had safely reached their destination oversea,[2] or unless the merchandise was lost in transit by accident or occurrences other than ordinary "perils of the sea," such as by being confiscated by Customs authorities as illicit or contraband goods.[3]

> *Pecunia trajectitia* possessed three characteristics, which distinguished it from both an ordinary *mutuum* and an ordinary loan of money, namely—there required to be (1) a loan of money intended to be converted into merchandise; (2) the merchandise so purchased with the money lent must be shipped oversea for disposal; and (3) the loan was at the risk of the lender until the safe arrival of the goods at the port of destination.[4]

SECTION 115.—THE CONTRACT OF COMMODATE[5] (COMMODATUM)

This was, like *mutuum*, a gratuitous loan of property; but, unlike *mutuum*, it was a loan for use only, and not for consumption. In "commodate" the borrower obtained only the *use* of the thing lent, for a limited time and for a temporary purpose, and his obligation or liability was to restore to the lender the actual or identical property lent on the expiry of the period fixed.

It was of the essence of commodate that the loan was gratuitous, and that the thing was lent without any consideration or fee for its use being either agreed upon or given, for otherwise the character of the contract would have been thereby changed to that of "location" (*locatio*) or hire. The lender, under the contract of commodate, was called the *commodator* (or the *commodans*), and the borrower was known as the *commodatarius* or the "commodatary."

From its very nature the contract of commodate was unsuited to the loan of "fungibles" or things that are actually consumed in the

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[1] The interest was not limited (Paul, *Sent.* ii. 14, 3) until Justinian latterly fixed a maximum of twelve *per cent. per annum* (*Code*, iv. 32, 26, 1).

[2] *Dig.* xxii. 2, 3; *Code*, iv. 33, 4.

[3] *Code*, iv. 33, 3.

[4] The contract was thus a contingent one (French, *aléatoire*), since the payment of both the capital and the interest are dependent upon the happening of an uncertain future event.

[5] Justinian, *Inst.* iii. 14, 2; *Dig.* xiv. 7, 1, 3, 4; *Dig.* xiii. 6, 18 pr. See Cuq, *Institutions Juridiques des Romains*, ii. 391, 392; Hunter, *Roman Law*, 4th ed., 475-479; Poste, *Institutes of Gaius*, 4th ed., 325; Mackenzie, *Roman Law*, 7th ed., 215-219; Moyle, *Institutes of Justinian*, 4th ed., 394, 395; Sohm, *Institutes of Justinian*, 3rd ed., 376; Girard, *Manuel de Droit Romain*, 5th ed., 529, 530; May, *Éléments de Droit Romain*, 8th ed., 269, 270. *Cf.* French Civil Code, Arts. 1874-1891.

course of their ordinary and natural use, because the principal liability of the borrower (*commodatarius*) was to restore to the lender (*commodator; commodans*) the actual thing lent.[1]

Commodate was originally, and strictly, a unilateral contract entered into for the benefit of the borrower alone, and, in consequence, imposing obligations only upon him; but the Praetor came, in time, to allow a "commodatary" to claim from the *commodator*, or lender, any considerable and unexpected expenses which he might have necessarily and reasonably incurred whilst the property was in his possession.

(1) *Duties of the Borrower* (*Commodatarius*)

The primary duty or liability of the borrower in the contract of "commodate" was to restore the actual thing lent, on the expiry of the period for which the loan had been granted, in as good condition as it was when he received it, except for such depreciation as might be naturally occasioned and expected through ordinary and reasonable use. The borrower was also bound to use the property lent only for the purpose that had been agreed upon or intended;[2] so that if a borrower fraudulently obtained the loan of a thing in commodate ostensibly for a purpose of which he knew the owner of it would approve, but really for a purpose of which he knew the owner either did not, or might not, approve; or if a borrower having obtained, in good faith, property in commodate, subsequently used it in a manner of which he knew the owner disapproved, or would not permit, he was regarded, in such circumstances, as having committed "a theft of the use" (*furtum usus*), which subjected him to liability to pay compensation to the lender.[3]

A further duty imposed upon the commodatary was to take good care of the property lent, in the absence of any special agreement otherwise.[4] The extent of his obligation in this respect was to exhibit the care of "the prudent man of business" (*bonus paterfamilias*), which implied *exacta diligentia*, or the utmost care, because the contract was, strictly, wholly for the benefit of the borrower.[5] It was not sufficient for the borrower, in order to escape liability to the lender for the loss

[1] In certain exceptional circumstances, however, fungibles might be the subject of commodate if they were lent expressly not to be consumed, but merely for display; but such a loan was not a true commodate, it was only a quasi-commodate (cf. *Dig.* xiii. 6, 3, 6; xiii. 6, 4).

[2] Cf. *Dig.* xiii. 6, 23; xiii. 6, 5, 7. In such cases, if there was no fault (*culpa*) on the part of the borrower, any loss would fall on the lender.

[3] Cf. Justinian, *Inst.* iv. 1, 6; Gaius, *Inst.* iii. 196, 197; *Dig.* xlvii. 2, 54.

[4] *Dig.* xiii. 6, 5, 7; xiii. 6, 23; *Code*, vi. 43, 1.

[5] See "Theory of Responsibility for Fault," *ante*, p. 329, and specially p. 331.

of, or injury to, the thing lent, to use merely as much care as he himself ordinarily employed with regard to his own affairs, unless he could show that the loss or injury could not have been prevented even by the exercise of the utmost care. If, however, no amount of carefulness could have prevented the loss or injury, or if, in other words, it was unavoidable, whether in the form of "inevitable accident" (*damnum fatale*)[1] or "superior force" (*vis major*),[2] the loss would fall upon the lender (*commodator*), and the borrower would not be liable for it, upon the principle that, in the absence of fault on the part of anyone, the loss falls upon the owner of the thing.[3]

There were circumstances, however, in which a commodatary might be liable for loss or injury occasioned by either inevitable accident or superior force, as when he had kept the property lent beyond the time agreed upon in the contract, or, if no time had been fixed, beyond the time reasonably sufficient to accomplish the purpose for which the property had been borrowed.

There is an important distinction between *mutuum* and commodate with regard to the risk of loss of, or injury[4] to, the property borrowed.

In *mutuum* the borrower became the actual owner of the property lent, subject only to a liability to restore to the lender the same kind of thing, and of the same quantity and quality.[5] This obligation did not depend upon what might subsequently happen to the property, for, whatever its fate might be, the borrower's liability none the less continued, even if the property had been lost as by fire, or robbery, or shipwreck, or by the fall of a house, or by flood, or by war, or any such-like inevitable or unavoidable occurrences, because in *mutuum* the borrower, as has been already said, became the owner (*dominus*) of the property borrowed, and the general principle of the Roman Law consequently applied to the effect that, in the absence of fault, accidental loss falls upon the owner. In commodate, on the other hand, the "commodatary" or borrower did not become the owner of the property lent, and his right was only to its custody and use, subject to an obligation that was implied in the contract, and did not require to be expressed, to restore the identical thing lent upon the expiry of the time agreed upon for the loan. The duty of the commodatary to take the utmost care of the thing lent was based upon the principle that extreme care of

[1] See *post*, p. 347.

[2] See *post*, p. 347.

[3] *Res perit domino.* Loss of property lent by theft was regarded as inferring the absence of sufficient diligence, and would fall upon the borrower (*Dig.* xiii. 6, 21, 1).

[4] The question of "risk" was known in the Roman law by the term *periculum*.

[5] See *ante*, p. 334.

the property lent constituted a fair equivalent for the gratuitous benefit which he received under the contract.[1]

In addition to his other liabilities the commodatary was also liable for all ordinary expenses connected with the thing lent, and necessarily incidental to its possession and use; but he was entitled to be reimbursed by the lender for all extraordinary and exceptional expenses necessarily and reasonably incurred by him while the property was in his possession.

> "Ordinary" expenses were such things as incidental and trifling repairs, as the food of animals, or slaves, or such like;[2] whilst "extraordinary" expenses included such things as money expended upon medical attendance upon sick slaves or animals, if of considerable amount, or in recovering the property if its possession had been lost without fault on the part of the borrower, and, generally speaking, all expenses of more than a comparatively trifling amount that were not necessarily incidental to the possession and the use of the property, and which were reasonably and necessarily incurred by the borrower in the preservation of the property lent.[3]

(2) *Duties of the Lender* (*Commodator or Commodans*)

The lender, or *commodator*, was bound to permit the borrower to use the property lent according to the terms of their agreement, after he had duly delivered it, and thereby created the contract. It was also the duty of the lender to pay any "extraordinary" or unusual expenses, or such expenses as could not be expected to have been in the contemplation of the parties as necessarily incidental to the possession and use of the property when making the contract, that had been reasonably incurred by the borrower in connection with or in preserving the thing lent.[4]

The thing lent required to be suitable for the purpose for which it was borrowed, so that if, for example, a person knowingly lent something unsuited to the purpose of the loan, such as rotten wood to build a house,[5] leaky casks,[6] or a vicious animal,[7] he would be liable to pay compensation to the borrower for any loss or damage that might be thereby occasioned.

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[1] *Dig.* xiii. 6, 5, 2. If, however, the lender also received some benefit from the contract, the degree of care required on the part of the borrower was proportionately reduced (cf. *Dig.* xiii. 6, 18 pr.; xiii. 6, 5, 10; and Hunter, *ut supra*, 477).

[2] *Dig.* xiii. 6, 18, 4.

[3] Paul, *Sent.* ii. 4, 1. Cf. *infra*, "Duties of the Lender."

[4] Paul, *Sent.* ii. 4, 1. See Cuq, *ut supra*, 392; cf. *supra*, *re* "Extraordinary Expenses."

[5] Cf. *Dig.* xiii. 6, 17, 3.

[6] Cf. *Dig.* xiii. 6, 18, 3.

[7] Cf. *Dig.* xiii. 6, 22.

Since the contract of commodate did not transfer ownership (*dominium*), or even the "possession" (*possessio*) of the subject, in the strict sense,[1] as did the contract of *mutuum*, it was not necessary to the validity of a commodate that the lender should have a good title as owner to the subject of the contract, for his warranty to the borrower was not one of title but merely against eviction; so a person who was not owner—even a thief—could competently lend a thing in commodate.[2]

(3) *Remedies of Borrower in Commodate*

The commodatary, or borrower, might enforce his rights under the contract against the *commodator*, or lender, either by "retention" (*retentio*) of the property[3] or by an *actio commodati contraria*, or, in special circumstances, by an *actio utilis commodati contraria*; this latter action at law was of a special character, and was one available to a commodatary in order to compel a commodator to restore the value of property that had been lent in cases where the lender had, without the knowledge or consent of the borrower, carried off the thing lent, and had then sued the borrower for restoration of the property and had obtained from him, on his failure to implement his obligation to deliver the thing lent, payment of its value.[4]

(4) *Remedy of Lender in Commodate*

The lender (*commodator*, *commodans*) could enforce the duties of the borrower, and compel him to perform them by means of the *actio commodati directa*. If the borrower had, without any fault on his part, lost the property lent, he might be compelled to give security to deliver it up if he should find it, or if it should again come into his possession.[5]

SECTION 116.—THE CONTRACT OF DEPOSIT (DEPOSITUM)[6]

This contract, in the Roman legal system, was one according to which a person called the "depositor" (*depositor*) gave to another person called the "depositary" (*depositarius*), some property belonging to him to keep or hold for him gratuitously, and under an implied

[1] *Dig.* xiii. 6, 8-9. See Part III., Chapter II., p. 209.

[2] *Dig.* xiii. 6, 15, 16.

[3] *I.e.* lien. *Cf.* Moyle, *ut supra*, 395; Cuq, *ut supra*, 392.

[4] *Dig.* xiii. 6, 21.

[5] *Dig.* xiii. 6, 13 pr.

[6] Justinian, *Inst.* iii. 14, 3; *Dig.* xliv. 7, 1, 5; *cf.* French Civil Code, Arts. 1915-1963; Cuq, *Institutions Juridiques des Romains*, ii. 394-397; Hunter, *Roman Law*, 4th ed., 479-482; Mackenzie, *Roman Law*, 7th ed., 221-224; Buckland, *Principles of Roman Law*, 239, 240; Moyle, *Institutes of Justinian*, 4th ed., 395, 396; Poste, *Institutes of Gaius*, 4th ed., 325; Sohm, *Inst.*, 3rd ed., 376-378.

obligation to give back the property whenever he should be asked to do so, with all its fruits and accessories.[1]

The contract of deposit (*depositum*) was completed by delivery, just as were the contracts of *mutuum* and of *commodate;* but it is distinguished from each of these contracts. It is differentiated from *mutuum* in respect that the person receiving the property did not acquire either the ownership (*dominum*) or the possession of it, and it is distinguished from "commodate" by the fact that the person receiving the property—*i.e.* the depositary—did not thereby acquire either the right of even legal possession or the right to use and enjoy the property, for the depositary's right under the contract was one of bare custody and detention (*detentio*)[2] at the pleasure of the depositor; so that the use of the property by him might constitute a theft (*furtum usus*), such as might subject him to liability to pay interest.[3]

(1) *Risk* (*periculum*) *in Deposit*

The risk of loss or of accidental injury remained with the depositor, but the depositary was bound to exercise reasonable care in the custody of the property, and to employ such diligence as he ordinarily used with regard to his own affairs;[4] he was only liable to the depositor if the loss or injury was due to gross neglect, or to wilful destruction, or to fraud (*dolus*) on his part, because the contract was one created primarily for the benefit of the depositor, and therefore such a high degree of care was not required by the law as would have been the case if it had been for the benefit of the depositary.[5] In this respect, also, "deposit" is distinguished from "commodate," in which latter contract the benefit was entirely for the borrower.

If, however, the depositary specially undertook to keep the property safe, he would be bound to exercise a greater degree of care—the amount of which would be in proportion to the extent of the depositary's undertaking—and would consequently be liable for a lesser degree of negligence than in those cases where no such special undertaking had been given.[6] If it was agreed that the depositary was to receive any

[1] Gaius, *Inst.* iv. 47; Justinian, *Inst. ut supra; Dig.* xvi. 3; *Code*, iv. 34; *Dig.* xvi. 3, 1, 8; xvi. 3, 1, 45; xvi. 3, 1, 24; xvi. 3, 34.

[2] See Part III., Chapter II. *Cf.* French Civil Code, Art. 1930.

[3] *Code*, iv. 34, 3-4. If the depositary was either expressly or impliedly authorised by the depositor to use the property deposited, the contract would become one of either commodate or of location (hire), according as the use was to be gratuitous or for a consideration.

[4] *Cf.* French Civil Code, Art. 1927.

[5] *Dig.* xiii. 6, 5, 2.

[6] In some cases the depositary might even be liable for accidental loss (cf. *Dig.* xii. 1, 4 pr.; see Hunter, p. 481).

compensation or consideration in respect of the deposit, the character of the contract would be thereby changed to one of "hire of services" (*locatio operarum*), and the depositary in such a case would become liable for loss or injury arising from even slight carelessness in the preservation of the property, because he would then be deriving benefit from the contract as well as the other party.

(2) *Duties of the Depositary*[1]

The principal duties of the depositary were, in the absence of any special agreement otherwise, to keep the property safe, and to restore it to the depositor when demanded by him, with all its fruits and accessories, without making any charge or taking any consideration for its custody. The depositary, however, was entitled to claim from the depositor any necessary expenses that had been reasonably incurred by him on account of the property deposited and which were reasonably incidental to its custody or necessary for its preservation, and to be indemnified for any loss caused to him by the property.[2] Thus, for example, the depositor was liable for damage caused to the depositary by the property deposited if he knew, or in the circumstances ought to have known, that it was likely to cause damage or loss,[3] and for the cost of its transit;[4] and the depositary was entitled to retain the property deposited in security of such expenses.[5]

But the depositary was not entitled to set-off the property deposited with him against any other debt due to him by the depositor, although he was entitled to do so against any expense incurred by him in connection with the thing itself, or on account of loss or damage caused to him by the thing deposited, if, from the nature of the property, such was likely to happen.

> The reason for the inability to set off deposit against any other debt was because of the special trust and confidence in the depositary on the part of the depositor that was implied by the fact of depositing the property with him.

If the depositary refused to restore the property when demanded by the depositor, and was at the same time in a position to do so, he was liable in interest upon the value of the property.

The depositor could enforce his rights against the depositary by the

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[1] *Cf.* French Civil Code, Arts. 1927-1946.
[2] *Cf.* French Civil Code, Art. 1947.
[3] *Dig.* xiii. 7, 31.
[4] *Dig.* xvi. 3, 12 pr.
[5] *Cf.* French Civil Code, Art. 1948.

actio depositi directa, or "direct" action on the contract, in order to obtain restitution of the property; if the depositor had transferred his right of restitution to some third person, the latter might, in his turn, enforce his right against the depositary by an *actio utilis depositi directa*.[1] Such an action was also available to the depositor against any person with whom the depositary might have, on his part, deposited the property.[2]

(3) *Special Forms of Deposit*

There were certain special forms of the contract of deposit; in particular (*a*) that known as "necessary" deposit (*depositum miserabile*);[3] (*b*) that styled "irregular" deposit (*depositum irregulare*); (*c*) sequestration; and (*d*) regulated by the operation of the Praetorian edict "*Nautae Caupones*," to which reference has been already made.[4]

(*a*) "Necessary" deposit[5] arose in those cases where persons were compelled through stress of circumstances, such as, *e.g.*, fire, shipwreck, riot, the fall of a house, or similar sudden calamitous conditions,[6] to deposit their property in the hands of persons whom they did not know, and of whose honest discharge of the trust imposed upon them they were not certain. A "necessary" depositary who was unfaithful to his trust was liable to be sued under a Praetorian action for double the value of the property entrusted to him.[7]

(*b*) "Irregular" deposit (*depositum irregulare*) was a form of deposit that closely resembled *mutuum*, in respect that it was a loan of fungibles under an agreement that the depositary should become the owner of them thereby, and should only be bound to restore a similar quantity and quality; moreover, like *mutuum*, the property was at the risk of the depositary and he had the right to use and so consume it. "Irregular" deposit differed from *mutuum* only in the intention of the parties: in *mutuum* the benefit was wholly with the borrower (unless there was a stipulation as to interest), but in *depositum irregulare* the intention was to benefit the depositor.

The legal consequences of this distinction were material: in *mutuum*

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[1] *Code*, iii. 42, 8.

[2] Paul, *Sent.* ii. 12, 8.

[3] *Cf.* French Civil Code, Art. 1920, and Arts. 1949-1954.

[4] *Ante*, p. 302.

[5] Called by the Romans and styled by the commentators *depositum miserabile*, but not so named by the Roman jurists themselves.

[6] Cf. *Dig.* xvi. 3, 18.

[7] *Dig.* xvi. 3, 1, 1-4; xvi. 3, 18; Justinian, *Inst.* iv. 6, 17. See Moyle, *ut supra*, at p. 396, on *depositum miserabile;* also Cuq, *Institutions Juridiques des Romains*, ii. 395. *Cf.* French Civil Code, Arts. 1949-1954.

interest could only be sought if it had been the subject of express stipulation, but the *actio depositi* being one of good faith (*bonae fidei*) interest could be claimed under "irregular" deposit either under the contract or on the ground of undue delay (*mora*). The most usual example of *depositum irregulare* was money deposited with bankers, and money deposited that was unsecured by key, seal, or other fastening was presumed to be an "irregular" deposit.[1]

(*c*) "Sequestration" (*sequestratio*),[2] as a special form of deposit, was the placing of property in which two or more persons had competing interests in the custody of a third neutral person called the *sequester*, until the determination of the issue between the parties. The most frequent example of sequestration was the deposit of the subject-matter of an action at law until the decision of the case. Sequestration might be either voluntary or judicial, and the obligation, whether express or implied, that was put upon the depositary in a sequestration was that he should deliver the property to the person or persons found to be entitled to it as a result of the fulfilment of a condition, or of the settlement of the question between the parties, whether that were voluntary under a reference and arbitration, or judicially by a judgment of the Court. The application of sequestration as a special form of deposit was wider than that of ordinary deposit, because immovables as well as movables might be sequestrated, and even a person whose status was in dispute might be the subject of a sequestration. The *sequester* had usually only the bare custody or "detention" (*detentio*) of the property, but he might have, by express agreement, the civil possession in order to prevent the acquisition of the property deposited by usucapion on the part of any of the competing claimants to it.[3] The position of a *sequester* or stakeholder having the custody of some property until a dispute regarding it should be determined, was the same as that of a pledgee.[4]

(*d*) The edict *Nautae Caupones* regulated, under the general name of *receptum*,[5] another, and a very important, special form of the contract of deposit by which a quasi-contractual relation and liability was

[1] *Dig.* xix. 2, 31. See on "irregular" deposit, Moyle, *ut supra*, 396; Cuq, *Institutions Juridiques des Romains*, ii. 395, 396.

[2] See on sequestration, Cuq, *ut supra*, ii. 396; Moyle, *ut supra*, 396; Hunter, *ut supra*, 383; Mackenzie, *ut supra*, 222; Girard, *Manuel de Droit Romain*, 5th ed., 531. *Cf.* French Civil Code, Arts. 1955-1963.

[3] *Dig.* xvi. 3, 17, 1; xvi. 3, 6; xli. 2, 39.

[4] Sohm, *Institutes of Roman Law*, 3rd ed., 332, note 2.

[5] *Receptum* was a "Praetorian Pact" (see *ante*, p. 293), and it assumed three forms, namely, (1) *receptum nautarum, cauponum, stabulariorum*; (2) *receptum argentariorum*; and (3) *receptum arbitrii*. See on *receptum*, Girard, *Manuel de Droit Romain*, 5th ed. 605-608.

created. This edict is generally known and referred to by the words with which it commenced — namely, *nautae, caupones, stabularii*,[1] and it was issued by the Praetor in order to regulate the liability of ship-masters or carriers by water (*nautae*), innkeepers (*caupones*), and stablers (*stabularii*) for the property of travellers which had either been expressly entrusted to their care, or had been so entrusted by implication through the fact of having been brought by the travellers into the ship, inn, or stable as the case might be, and there deposited.

Under this edict the Roman Law held carriers by water (*nautae*) and keepers of inns (*caupones*) where travellers were accommodated with food and lodging liable for loss of or injury to property belonging to travellers that had been either brought with them or deposited by them. The liability thus imposed by the edict was absolute, and arose from the mere fact of loss or injury, whether it had been caused by the acts of the carriers, or of the innkeepers themselves, or had been occasioned by the acts of their servants or by the acts of strangers. The fact that property so deposited or intrusted had been stolen by a servant or by a stranger did not exempt the carrier or the innkeeper from liability, because the object of the edict was, by its severity, to protect travellers against both dishonesty and negligence, and if persons were able to obtain access to the premises unnoticed and commit theft, that was regarded as in itself implying a lack of sufficient care.

There was not any liability under the edict, however, in cases where the loss or damage had been caused by either inevitable accident (*damnum fatale*), or superior force (*vis major*),[2] but the burden (*onus*) of proving this was upon the carrier or the innkeeper, and if he failed in doing so he was liable from the mere fact of the loss or damage having happened.

Damnum fatale.—The Romans used the term *damnum fatale* to signify any loss or injury that was inevitable or unavoidable in that it was occasioned by natural phenomena, such as storm, lightning, earthquake, cloud-burst, or such like, which do not originate by human means, and are not controllable or avoidable by either human skill or foresight.

Vis major.—This expression, signifying literally "superior force," was employed with reference to loss or injury caused to either property or person in circumstances involving the exercise of human force or resistance, such as robbery, riot, piracy, and such like events, both occasioned and preventible by human means and actions. *Vis major* operated as a defence if it could be proved that the whole force which the person sought to be made liable for the loss could employ in resistance was

[1] *Dig.* iv. 9, 1 pr., 1 ; xlvii. 5. See upon this edict, Mackenzie, *Roman Law*, 7th ed., 222 ; Girard, *ut supra*, 607 ; May, *Éléments de Droit Romain*, 8th ed., 327.

[2] *Dig.* iv. 9, 3, 1.

actually and seriously employed, and that it was yet inferior to the force sought to be resisted.

In the operation of the edict *Nautæ Caupones*, the Roman Law distinguished between loss arising from theft committed secretly and without violence, and loss occasioned by the exercise of violence and superior force, as in the case of robbery.

In the case of secret theft there was, *ipso facto*, liability, and the mere fact of the theft happening was held to imply negligence and want of sufficient care; but in the case of robbery there was no liability, since no amount of care and resistance could have prevented the loss if the force employed to overcome the resistance was actually superior to it, provided that the resistance offered to the violence was made in a genuine (*bona fide*) effort to preserve the property.

The principle of this edict has been generally adopted and extended in the legal systems of modern Europe and in the States of North America, and it is applied, in different ways, in order to regulate the liability of carriers by both sea and land,[1] such as railway and shipping companies, and of hotelkeepers, and, generally, of all those persons who hold themselves out to facilitate travel and transit.[2]

SECTION 117.—THE CONTRACT OF PLEDGE (PIGNUS)[3]

The contract of *pignus*, or "pledge," was the fourth of the contracts *re*, or "real" contracts under Justinian's classification. *Pignus*, in the Roman Law, may be defined as the delivery of a thing to a creditor as a security for debt, upon condition that the creditor would restore the property to the debtor on payment of the debt or performance of the obligation, and that the creditor should be entitled to sell the property and pay his debt with the proceeds if the debt was not paid by the time fixed.[4]

The contract of *pignus* or pledge was thus a form of right in security.

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[1] This is a more extended application than that of the Roman Law, in which the term *nautae* only applied to carriers by water.

[2] *Cf.* French Civil Code, Arts. 1952-1954.

[3] *Dig.* xx. 1-6; *Code*, viii. 14; Justinian, *Inst.* iii. 14, 4; *Dig.* xiii. 7, 13, 1; xliv. 7, 1, 6; *Code*, iv. 24. See also Hunter, *Roman Law*, 4th ed., 430-448; Moyle, *Institutes of Justinian*, 4th ed., 326-331; Sohm, *Institutes of Roman Law*, 3rd ed., 352-355, 378; Cuq, *Institutions Juridiques des Romains*, i. 634-638; ii. 397-399; Buckland, *Principles of Roman Law*, 241-244; Mackenzie, *Roman Law*, 7th ed., 224-228; Sandars, *Institutes of Justinian*, 8th ed., 135, 136, 331, 332; Girard, *Manuel de Droit Romain*, 5th ed., 526-529, 532, 533; French Civil Code, Arts. 2073-2091.

[4] The power of sale was not originally an implied term in the contract of *pignus*, although it ultimately became such.

In order to constitute and complete the contract delivery was essential. The effect of the delivery of the property by the debtor to the creditor was merely to transfer its lawful possession, but the *dominium*, or actual ownership, remained with the debtor, and he, or his heirs or representatives after his death, might recover the property from either the creditor himself or any third party in whose hands it might happen to be, by means of a *rei vindicatio* or real action for the recovery of property that is already one's own.

The contract of *pignus* marks the second stage in the history of the Roman law of mortgage. In its original form the grant of a right in security involved the actual and absolute transference of the property with both its possession and its ownership, by *mancipatio*, or *in jure cessio*, qualified by a collateral *pactum fiduciae* or "fiduciary agreement"[1] on the part of the creditor to reconvey the property to the debtor on payment of the debt at the time fixed or agreed upon, with any interest upon it. The next stage in the development of the law regarding the grant of a right in security of a debt or obligation was the recognition, under the name of *pignus*, of an agreement in respect of which the creditor got only the lawful possession (*possessio*) of the subject, while the *dominium* or ownership of it remained with the debtor. This modification of the law relating to the granting of a security was due to the recognition in the Praetorian Edict of a right to legal possession as distinguished from a right of ownership, and its consequent protection of a possessory title to property.[2]

(1) *Disadvantages of Pignus*

Both the original mode of granting a security by means of an absolute transference of the property by "mancipation" qualified by a

[1] A *contractus fiduciae* was the conveyance of anything by *mancipatio* or *in jure cessio*, with the condition that if a certain sum was paid by a certain day the thing would be reconveyed. If the creditor sold the property before the time for payment he might be declared *infamus* under an *actio fiduciae* brought against him by the debtor, who, however, did not thereby recover his property. See Hunter, 434; Isidor, *Orig.* v. 25; Gaius, ii. 59-61.

[2] See "Ownership and Possession," *ante*, Part III., Chapter II., p. 209 *et seq.* The contract of *pignus* gave rise to the *actio pigneraticia*. This action was "direct" (*directa*) when it was used by the debtor to compel the creditor either to give back the property pledged, if the debt had been paid, or to pay over the surplus price if the thing pledged had been sold, or to obtain compensation from the creditor for any injury to the thing pledged caused by his fault. The *actio pigneraticia* was "contrary" (*contraria*) when the creditor used it to compel the debtor either to repay him expenses necessarily incurred for the preservation of the thing, and to compensate him for injuries sustained by the thing pledged through the fault of the debtor, or to compensate him if the thing pledged proved to be not the property of the debtor and was claimed by the real owner. *Cf.* Sandars, *Institutes of Justinian*, 8th ed., 332.

collateral "fiduciary agreement" (*pactum fiduciae*) to reconvey the property on performance by the debtor of his obligation, and the later form of security recognised by the Praetorian Edict under the name of *pignus*, had certain marked disadvantages. Under the fiduciary form the debtor lost both the ownership and the possession of the property, while under the modified form of *pignus*, the debtor, while retaining, indeed, the ownership, lost both its possession and, consequently, its use. On the other hand the creditor, although he got the lawful possession of the property, was not entitled to use it, or to enjoy its fruits or profits, or to sell it without express agreement with the debtor to that effect, or to "vindicate" it from third parties since he was not the owner (*dominus*). A still further and serious disadvantage of *pignus*, in particular, was that nothing could be given in pledge that was incapable of physical delivery, for delivery was essential to the completion of the contract; moreover, the same property could not be pledged to different persons for different debts, even although its value might be fully sufficient to cover the amount of all the debts.

These disadvantages and inconveniences attaching to *pignus*, or pledge, in its strict sense,[1] rendered it necessary to devise some form of legal security which would leave with the debtor not only the *dominium* or ownership of the security subject, but also both its possession and its use, but which would, at the same time, give to the creditor such a real right in the property as would entitle him, if necessary, failing payment or performance by the debtor, to take the security subject and sell it and satisfy his debts with the proceeds. In this way the third stage in the development of the law of mortgage was reached by the recognition in the Praetorian Edict of a form of contract in security under the name of *hypotheca* or "hypothec."[2]

Although the three stages signified respectively by the *pactum fiduciae*, *pignus*, and *hypotheca* were successive, the introduction of the later did not involve the disappearance of the earlier form. "In point of fact, pledges with and without possession continued to exist, and were subject to precisely the same rules, so that they fall to be considered together, and may in fact be treated as one.[3] The earliest (*fiducia*) long co-existed with the other two and may have flourished up to the time of Constantine. That Emperor, however, gave it a death-blow,

[1] *I.e.* as a grant in security by actual delivery of the security subject. Ultimately *pignus* became identified with *hypotheca* although there always remained the essential theoretical distinction that the *pignus* strictly involved delivery, whereas under *hypotheca* the creditor got a real right to property that, nevertheless, remained in the debtor's possession. See "Hypothec," *post*, p. 351.

[2] See upon the History of Pledge or Mortgage in Roman Law, Sohm, *Institutes of Roman Law*, 3rd ed., 352-355; Poste, *Institutes of Gaius*, 4th ed., 326, 327.

[3] *Dig.* xx. 1, 5, 1.

for he abolished the *lex commissoria*[1] which was of the essence of the *fiducia*, namely, that if the money borrowed were not repaid by a given day the pledge would be forfeited and become the absolute property of the lender. Moreover, when the ancient forms of conveyance, *mancipatio* and *cessio in jure*, fell into disuse, *fiducia* lost the other pillar upon which it rested; and in the time of Justinian, if not earlier, it had passed into oblivion."[2]

SECTION 118.—HYPOTHEC (HYPOTHECA)[3]

This was a "Praetorian pact," or otherwise a special form of agreement deriving its validity and its enforceability from the Praetor's edict.[4] "Hypothec" (*hypotheca*) was a mortgage or security for debt, created by either (*a*) express agreement, or (*b*) by testament, or even (*c*) tacitly, by mere operation of law,[5] and it was specially characterised by the fact that neither the ownership nor the possession of the subject was transferred to the creditor, both of these remaining with the debtor, who at the same time enjoyed the use of the property in so far as the rights of the creditor were not thereby prejudiced.

"Hypothec" may be otherwise described or defined as a pledge of property either by mere agreement, or by implied agreement, without any special formality, and without the necessity of delivery of possession for the completion of the contract.[6]

(1) *Origin of Hypothec*

The contract of "hypothec" (*hypotheca*) was originally introduced by the Praetorian Edict, in the regulation of the special relation of landlord and tenant; and it was designed to be a means by which the tenant could pledge the produce of the land cultivated by him in security of his rent. Hypothec originated in the practice of the great Roman landowners letting out their estates for cultivation as small farms. The only property possessed by these small tenant farmers was, for the most part, practically the stocking of their farms. Whilst it

[1] *Code*, viii. 35 (A.D. 326). On *Lex commissoria*, see *ante*, p. 325.

[2] Hunter, *Roman Law*, 4th ed., 434. *Cf.* also Sohm, *ut supra*.

[3] See Cuq, *Institutions Juridiques des Romains*, ii. 304-318.

[4] See on "Praetorian Pacts," *ante*, p. 293.

[5] *I.e.* hypothecs were (*a*) "conventional," (*b*) "testamentary," and (*c*) "legal" or tacit.

[6] Any form of words sufficed to create the contract if they were sufficiently clear (*Dig.* xx. 1, 4), and parties did not require to be actually present; a hypothec might be created in absence, as by letter, or by messenger (*Dig.* xx. 1, 23, 1). The agreement was generally in writing, but that was not essential to its validity (*Code*, viii. 14, 12).

was necessary that the landowners should have some form of security for their rent, the contract of *pignus* was, at the same time, obviously unsuited for such cases, as it would have involved the tenant delivering up to the landlord the possession, and at the same time depriving himself of the use of the very things by means of which the farm was to be cultivated and be rendered profitable and thereby capable of paying rent.

A praetor named Servius, but of whom nothing is known beyond that he lived before Cicero, introduced a form of action by means of which the landlord of a farm might obtain possession of the stock of his tenant for rent due, in those cases where the tenant had agreed that the stock should be treated as a pledge (*pignus*), even though no delivery of it had been given. This action was known as the *actio Serviana*, and it was subsequently extended, under the name *actio quasi-Serviana* or *hypothecaria*, to all cases in which it had been agreed between debtor and creditor that a thing should be regarded as a pledge, even although there had not been any completion by the fact of delivery of possession, and that it should be held by the debtor as security for the creditor. In this way "hypothec" (*hypotheca*) came to be the pledge of a thing by mere agreement, without any formality and without the necessity of delivery of possession in order to complete the contract.[1]

(2) *Advantages of "Hypothec" (Hypotheca) over Pledge (Pignus)*

The chief advantages of *hypotheca* as compared with *pignus* were that (1) the debtor was not deprived of the use and benefit of the thing pledged, while, at the same time, the creditor was fully secured by a "real" right in the property (*jus in re*);[2] (2) a greater variety of things could be pledged under hypothec, and it was not necessary that the property hypothecated should be capable of actual physical delivery; thus immovables as well as movables could be the subject of hypothec, and even future "things" (*res futurae*), such as a sown crop, or an unborn animal (*nasciturus*); (3) a general security or lien could be created by hypothec over the whole property of a debtor and not merely over particular parts of it; (4) the same thing might be hypothecated to different persons, at different times, for different debts.

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[1] See Hunter, *Roman Law*, 4th ed., 433. The *hypotheca* was borrowed, both in name and substance, from Greek law, and its development from *pignus* proper was brought about through the influence of the requirements of Greek trade. *Cf.* Sohm, *ut supra*, 334, 335.

[2] See on "real" rights, *ante*, Part III., Section 69, p. 212.

In course of time *hypotheca* and *pignus* became practically the same contract subject equally to the same rules and principles,[1] except that there always continued to exist the theoretical distinction that *pignus* in its strict and narrow sense involved the actual delivery of the security subject to the creditor upon the condition, either express or implied, that the creditor should restore the property to the debtor on payment of the debt, or on performance of the obligation, but that, failing payment or performance, the creditor was to be entitled to sell the subject.[2]

In contradistinction to *pignus* in the strict sense *hypotheca* or "hypothec" was a real security given by a debtor to a creditor over property belonging to the former, which, at the same time, was allowed, by mutual agreement, to remain in the possession of and to be used by the debtor. Apart, however, from this theoretical distinction *pignus* and *hypotheca* become in time practically interchangeable terms.[3]

(3) *Over what Kinds of Property Hypothec could be Granted*

Hypothec might be constituted over all kinds of property, whether corporeal movables or immovables, such as land and houses; and the agreement was competent to secure all kinds of obligations, or rights *in personam*, whether conditional or unconditional, "natural"[4] or "civil," past, present, or future.[5] The property hypothecated required to be something that was *in commercio*, and capable of being sold.[6] Any accessions to the thing hypothecated came within the hypothec; thus a house built upon hypothecated land was itself subject to the hypothec,[7] and a creditor had the same rights over the children of a hypothecated female slave as over the slave herself.[8]

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[1] *Cf.* Moyle, *ut supra*, p. 330.

[2] This power of sale was not originally implied in, and an essential part of, the contract of *pignus*, and it required to have been expressly granted by the debtor, under a *pactum quod liceat vendere;* latterly, however, it came to be an implied term of the contract (see *ante*, p. 348, note 4).

[3] See Justinian, *Inst.* iv. 6, 7; *Dig.* xx. 2, 4; xx. 1, 17; xx. 5, 1; also *Dig.* xiii. 7, 9, 2 (*Proprie pignus dicimus, quod ad creditorem rem transit; hypothecam cum non transit, nec possessio ad creditorum*), and *Dig.* xx. 1, 5, 1 (*Inter pignus autem et hypothecam tantum nominis sonus differt*).

[4] *Dig.* xx. 1, 5 pr. Unless where the result would have been to evade a positive law such as the *Senatus-Consultum Macedonianum* (see *ante*, p. 336) or the *Senatus-Consultum Valleianum* (see *ante*, p. 82).

[5] Hunter, *ut supra*, 445.

[6] *Dig.* xx. 3, 1, 2; *Dig.* xx. 1, 24.

[7] *Dig.* xiii. 7, 21.

[8] *Dig.* xx. 1, 29, 1; *Code*, viii. 25, 1.

(4) *Who Might Grant a Hypothec*

It was not necessary that the person giving the security by way of hypothec should himself be the debtor under the obligation for which the security was to be granted; any person was entitled to give a hypothec over his own property as a security for a debt or obligation incurred and owed by another person, and it was immaterial whether or not the obligation had been undertaken on his behalf or for his benefit.[1] Moreover, a person with only a power of sale, although not owner, such as a tutor or a procurator, could hypothecate property.[2]

SECTION 119.—MUTUAL RIGHTS AND DUTIES IN PIGNUS AND HYPOTHECA

When the creditor was in possession of the subject pledged he was bound to use "exact diligence" in order to preserve it.[3] If, however, the property was unavoidably lost while in the possession of the creditor, either from inevitable accident or from some inherent intrinsic defect, the loss fell upon the debtor as owner of the subject, and the creditor was still entitled to enforce the obligation;[4] but he was bound to show that he could not have prevented the loss or accident. The creditor, however, remained liable for wilful negligence (*dolus*) and for wrongdoing (*delictum*), and was bound to compensate the debtor for any loss caused to him by such means.

When the creditor was in possession of the security subject he was bound to account to the debtor for any fruits or profits of it, unless he was specially entitled to these by express agreement;[5] but an express agreement was not requisite in order to entitle him to apply the fruits or profits of the subject towards the extinction of the principal debt.[6] The creditor was entitled to be reimbursed all expenses necessarily incurred by him in the preservation of the subject pledged or hypothe-

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[1] *Dig.* xx. 1, 5, 2; xiii. 7, 9, 1.

[2] *Dig.* xiii. 7, 11, 7; xx. 1, 11 pr.

[3] Justinian, *Inst.* iii. 14, 4—*i.e.* he would be liable for *culpa levis*. See on *Culpa*, *ante;* but *cf.* Mackenzie, *ut supra*, p. 228, where only "ordinary" care and diligence is predicated.

[4] Justinian, *Inst.*, *ut supra.*

[5] It was sometimes specially agreed that the creditor was to be entitled to the fruits or profits of the subject pledged by way of interest upon the debt; such an express agreement was known as *pactum antichresis* (*Dig.* xx. 1, 11, 1; xiii. 7, 33; xx. 1, 1, 3; *Code*, iv. 32, 17). *Cf.* French Civil Code, Arts. 2085-2091.

[6] *Code*, iv. 24, 1; iv. 24, 2; iv. 24, 3.

cated,[1] and also all loss or damage sustained by him by reason of the subject.[2]

The obligation in respect of which a pledge was given or a hypothec was granted included the principal debt itself, and also any interest upon the debt,[3] and all necessary expenses in connection with the thing pledged and hypothecated. The debtor was entitled to have the pledge restored to him or to have the hypothec released when the whole debt, interest, and expenses had been paid, or if payment had been offered in good faith,[4] unless there were other unpaid debts due by the debtor to the creditor that were not secured by pledge or hypothec or otherwise; in such latter case a creditor in possession of a security subject was entitled to retain a pledge even after payment in full of the particular debt for which the pledge had been given,[5] but the right so given was merely one of retention and did not include a power of sale.[6] The debtor, if he remained in possession of the security subject, was entitled to use it provided he did nothing with it that was prejudicial to the right of the creditor; but a creditor in possession of the security subject was not entitled to use it, or to take its profits, without an express agreement to that effect.

Any accessions to the security subject were the property of the debtor; and in those cases where the subject was in the possession of the creditor, the debtor was entitled to have any accessions set off

[1] *E.g.*, repairing a house, medical attendance on a sick slave or animal. The claim to reimbursement remained good even although the slave or animal afterwards died or the house was afterwards burnt (*Dig.* xiii. 7, 8 pr.). *Cf.* French Civil Code, Art. 2080. It was a matter of dispute among Roman jurists whether a creditor was entitled to claim expenses that were not strictly "necessary" for the preservation of the property, but which were actually beneficial to it. Such expenses were known as *utiles impensae*, or "beneficial outlays," in contradistinction to *impensae necessariae* (Paul, *Sent.* ii. 13, 7; Ulpian, *Dig.* xiii. 7, 25; Hunter, 440).

[2] But if the debtor was in good faith (*in bona fide*) he had the alternative of "noxal surrender" (*noxae deditio*) or giving up to the creditor the thing that had done the injury. Cf. *Dig.* xlvii. 2, 61, 1; xiii. 7, 31; xlvii. 2, 61, 3. See also, on "Noxal Surrender," *ante*, p. 108.

[3] In the absence of an express *pactum antichresis.*

[4] A thing might be the subject of a contract of *pignus* even although it was not the property of the debtor; in such a case, however, it was liable to be claimed by the real owner, and the creditor would then have an *actio pigneraticia contraria* against the debtor for compensation (see note 2, *ante*, p. 349). But unless and until the property was claimed, the creditor remained bound to restore the property to the debtor on payment of the debt. *Cf.* Sandars, *Institutes of Justinian*, 8th ed., 332.

[5] But this was only as against the debtor himself (*Code*, viii. 27, 1). By the French Civil Code, Art. 2082, a creditor may retain a pledge for other debts due to him from the pledger without the necessity of any special agreement. By the law of England a creditor is not entitled to retain a pledge in security of any other debt than that for which it was given; and the law of Scotland, though not definite upon the point, is probably the same (see *National Bank* v. *Forbes*, 1858, 21 D. 79).

[6] See also *post*, p. 358 (Section 119 (2), "Creditor's Right of Retention").

against the amount of the debt, including any interest or expenses, unless by the special agreement known as *pactum antichresis* the creditor was to be entitled to the fruits or profits as or instead of interest upon the debt.[1]

(1) *Creditor's Right of Sale*

The creditor had a right to sell the thing pledged or hypothecated, and to satisfy his debt out of the proceeds of the sale, if the time fixed for payment of the debt, or performance of the obligation in respect of which the security had been given, had passed.[2] If, however, the right of hypothec had been granted conditionally, the creditor could not demand possession of the subject before the condition had been fulfilled and the debt had thereby become due.[3] If the amount realised by the sale more than sufficed to pay the whole debt (including, as it did in the ordinary case, any interest or necessary expenses) the debtor was entitled to get any surplus price, and the creditor was bound to hand it over;[4] but if the amount realised by the sale was not sufficient to pay the whole debt, the creditor still retained a personal action against the debtor for the recovery of the unpaid balance of the debt, although, by the exercise of his right of sale, the rights of hypothec or of *pignus*, as the case might be, were thereby extinguished.

The right of sale originally required to be express in order to entitle the creditor to validly exercise it, but it came, latterly, to be an implied term of the contract.

It was usual for parties to specially agree as to the mode or circumstances in which the power of sale was to be exercised, in which case no judicial authority was required; but in the absence of any such special agreement between the parties a special procedure was prescribed that was intended to protect the interests of both debtor and creditor. Justinian required[5] that the sale should not take place until two years had elapsed from the date when the creditor gave the debtor notice to pay, or from the date when the creditor obtained judicial authority to sell the property; if the creditor had not possession of the property, he required to obtain a judicial warrant to sell; but if he had possession of

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[1] "Fruits" or "profits" were held to include "natural," "civil," and "industrial" fruits, and such things as services of slaves and rents of houses, and generally any benefit derived by the creditor through or by reason of the security; there was, consequently, also included any damages that the creditor might have received on account of things stolen, unless the debtor was the thief (Hunter, 439; *Code*, iv. 24, 2; *Dig.* xiii. 7, 22 pr.; *Dig.* xlvii. 2, 79. On *pactum antichresis*, *cf.* French Civil Code, Arts. 2085-2091.

[2] *Cf.* Justinian, *Inst.* iii. 14, 4; iv. 6, 7; *Dig.* xx. 1; *Dig.* xiii. 7; *Code*, iv. 24; *Code*, viii. 14-18.

[3] *Dig.* xx. 1, 13, 5.

[4] *Dig.* xiii. 7, 42. The surplus of the amount realised by the sale over the value of the whole debt was called *hyperocha*.

[5] *Code*, viii. 34, 3, 1.

the property all that he required to do was to give formal notice to the debtor of his intention to sell, and he was then entitled to sell, two years after either of these events.[1]

If the same subject had been hypothecated successively to several persons, only the creditor whose hypothec was first in priority of time could exercise the power of sale; his right excluded that of all other creditors, and he was entitled to be paid in full, only the balance thereafter being divided amongst the subsequent creditors in order of their priority, unless a subsequent creditor had, by one or other recognised means, placed himself in the place of the first creditor.[2]

Priority in time was determined by the date of the contract of hypothec, and not by either that of obtaining possession of the property, or of the debt for which the hypothec was granted.[3] The creditor's right of sale only emerged when the debtor's default put the creditor in a position to sue him, or, in other words, when the debt became exigible,[4] but it continued thereafter until the whole debt, including principal, interest, and necessary expenses, had been paid.[5] If it had been agreed between the parties that payment of the debt was to be by instalments, and not all at one time, the creditor's right of sale did not become active until the last instalment was due and unpaid; if, however, on the other hand, the parties had agreed that if any of the instalments was not paid at one or other of the fixed times the creditor was to be then entitled to sell the property, he could legally do so if the debtor failed to pay even the first instalment.[6]

When the creditor sold the security subject he was assumed by the law to be acting as the agent of the debtor, and he was therefore bound to conduct the sale at such a time and in such a place and manner as would be most conducive to the interests of both himself and the debtor; consequently, if the creditor sold the security in bad faith, for less than he might reasonably have obtained for it, he was liable in

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[1] *Code*, viii. 34, 3, 1; *Dig.* xiii. 7, 4; xiii. 7, 5. By French law judicial authority to sell is requisite (Civil Code, Art. 2078). The same rule prevails in Scotland (2 Bell, *Com.*, 22), but in England the creditor, upon the debtor's failure to pay, is entitled to sell without judicial procedure after giving to the debtor reasonable opportunity to redeem (Story, *Commentary on the Law of Bailments*, 4th ed., secs. 308-310). See Mackenzie, *Roman Law*, 7th ed., 227.

[2] *Dig.* xx. 5, 5 pr.; *Code*, viii. 18, 1; viii. 18, 8; viii. 18, 5; *e.g.* a subsequent creditor who advanced money for the preservation of the property was given a preference (*Dig.* xx. 4, 5, 6).

[3] See *post*, p. 358. For examples illustrative of "priority" of creditors' rights, see Hunter, *ut supra*, 441-442.

[4] *Dig.* xx. 5, 4.

[5] *Dig.* xiii. 7, 8, 5; *Code*, viii. 28, 6; *Code*, viii. 29, 2.

[6] *Dig.* xiii. 7, 8, 3.

damages to the debtor; and if the purchaser had been in collusion with the creditor he was liable to restore the property to the debtor.

(2) *Creditor's Right of Retention*

This right, known as the *jus retinendi*, was one in respect of which the creditor was entitled to retain possession of the subject pledged as security for a debt or debts other than that for which it was given, that was or were due by the debtor to him, and were not otherwise secured, even after the debt for which the property had been pledged had been fully paid, or the obligation otherwise fully performed; this was, however, a mere right of retention, or lien, and did not give the creditor a "real" right in the thing (*jus in re*), or a right of sale.[1]

(3) *Rights of Creditors amongst Themselves* (*Inter se*)—*Priority*

Creditors who obtained a hypothec over the same thing at the same time were regarded as having equal and indivisible rights in the subject, and no such creditor had any preference over any other.[2]

The question of preference or precedence amongst creditors only arose when the same thing was hypothecated at different times to different creditors for different debts. In such cases the creditor who happened to have the prior hypothec was preferred to him who had acquired his right subsequently; the creditor who possessed the first hypothec had preference over all the other subsequent creditors, and was entitled to be paid his debt in full, only the balance that might remain thereafter being divisible amongst the subsequent creditors, in the order of their priority; but a subsequent creditor might put himself in the place of a prior creditor by paying off the latter's debt.[3]

The factor which determined the priority of a creditor's rights was the date of the granting of the hypothec, and was neither the date of acquiring possession of the property nor the date of the debt for which the security was given.[4]

If the date of the acquisition of a creditor's right of hypothec was known and certain, it was preferred to and got precedence or "priority" before the rights of creditors of which the date of acquisition was unknown or uncertain.[5] Moreover, all secured creditors, whether their rights were certain or uncertain, were preferred to those who were not secured by either pledge or hypothec.[6]

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[1] See *ante*, p. 355, and note 5.

[2] *Dig.* xiii. 7, 20, 1.

[3] Cf. *ante*, p. 357, note 2.

[4] Cf. *ante*, p. 357.

[5] See, for examples of priority among creditors, Hunter, *ut supra*, 441, 442.

[6] *Code*, viii. 18, 9.

SECTION 120.—TACIT OR IMPLIED HYPOTHECS (TACITA HYPOTHECA)[1]

Tacit hypothecs are those created by mere operation of law. The Roman Law recognised certain hypothecs in respect of particular kinds of debts, without the necessity of agreement concerning them; they were thus implied or "tacit" (*tacita*), and such hypothecs in certain cases were privileged to the effect of ranking before those that might be actually prior in date of granting.[2] Privileged and tacit hypothecs were either "general" or "special," according as they extended over the debtor's whole estate or only over a particular part of it.

(1) *Tacit "General" Hypothecs*

Among "general" tacit hypothecs were the following:—(1) The hypothec of the "fisc" (*fiscus*) or public treasury, in respect of taxes or of fines, over the whole property of a person so indebted;[3] (2) the hypothec of pupils, minors, and insane persons over the whole estates of their tutors or curators for loss arising through their fault;[4] (3) the hypothec of a husband over the property of the person bound to provide his wife's dowry (*dos*), and the hypothec of a wife over the property of her husband for restitution of her dowry;[5] (4) the hypothec of children under *potestas* over the property of their father in respect of property coming to them from their mother's side (*bona materna*);[6] (5) the hypothec of legatees, or of *fidei-commissarii* over the property of the deceased, or over the particular part of the inheritance that was burdened with the legacy, or the trust, in security of payment.[7]

(2) *Tacit "Special" Hypothecs*

Amongst "special" tacit hypothecs were (1) the hypothec of the proprietor of a rural subject—such as lands, gardens, vineyards—over the fruits (*fructus*) of the subject in security of the rent.[8] This right is known as the "rural hypothec." It extended only over the crops of

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[1] *Dig.* xx. 2; *Code*, viii. 15.

[2] *E.g.* debts to the public treasury; a married woman's claim to her dowry (*dos*); money advanced on security of property expressly to save it from destruction (*Dig.* xx. 4, 5). *Cf.* French Civil Code, Art. 2121.

[3] *Dig.* xlix. 14, 46, 3; *Code*, iv. 46, 1.

[4] *Code*, iv. 53; v. 37, 20; v. 70, 7, 5-6.

[5] Justinian, *Inst.* iv. 6, 29; *Dig.* iv. 5, 8; *Code*, viii. 18, 12 pr., 1, 2; v. 13, 1, 1; v. 3, 19, 2; v. 12, 30. This hypothec was introduced by Justinian. See upon "Dowry" (*dos*), *ante*, Part II., Sections 41-45, pp. 158-164.

[6] *Code*, v. 7, 8; vi. 61, 6, 4. See also on *bona materna*, Part II., Section 32 (*d*), p. 129.

[7] *Code*, vi. 43, 1; vi. 43, 3; *Novels*, 108, 2.

[8] *Dig.* xx. 2, 7 pr.

the tenant and nothing else, unless expressly agreed otherwise, in which case, moreover, it only applied to things intended for permanent use. The implied hypothec of the landlord attached to the crop (*fructus*) from the moment of gathering it.[1] (2) The hypothec of the owner of "urban" property[2]—such as houses, shops, warehouses, or other buildings—over the movable property brought by the tenant (*inquilinus*) into the urban subject for his personal use, in security of the rent.

This right is known as the "urban hypothec"; it covered all things brought in (*invecta et illata*) for use on the premises, although such had been done without the knowledge of the tenant, and it extended generally to all claims competent to the landlord against the tenant arising out of their contract of letting.[3]

> The particular kinds of property to which, by the Roman Law, the implied urban hypothec strictly applied were dwelling-houses, granaries (*horrea*), inns (*deversoria*), and threshing-floors (*areae*), but it did not extend to farms (*praedia rustica*).[4]

(3) The hypothec over a building possessed by a person who had lent money expressly either to build it, or to repair it to preserve it from destruction.[5] (4) The hypothec of legatees over the special portion of the testators' estate burdened with their legacies. (5) The hypothec of pupils over property bought by their tutors with their money.[6] (6) The hypothec possessed by bankers over immovables bought by their clients with money advanced by them.[7]

The tacit hypothecs given by the law to the owners of urban and rural subjects were the oldest of all such legal rights. All privileged hypothecs in regard to which priority in time was not postponed to other considerations ranked according to their priority in time, but were preferred to all non-privileged hypothecs.

All other hypothecs that were not so specially treated or protected by the law took rank and preference strictly according to their priority in time, and all creditors who were secured by pledge or hypothec were

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[1] *Dig.*, *ut supra.*

[2] Upon the distinction between the terms "rural" and "urban" see "Servitudes," *ante*, Part III., Section 87, p. 251.

[3] *Dig.* xiii. 7, 11, 5; xx. 2, 4 pr. See also *Dig.* xx. 2, 2-4, 6, 7, 9.

[4] *Dig.* xx. 2, 4, 1; *Code*, viii. 15, 5. The "urban" hypothec was originally confined to Rome and its suburbs, and was only extended to the provinces by Justinian (*Code*, viii. 15, 7).

[5] *Dig.* xlii. 5, 24, 1; xx. 2, 1; xx. 4, 5.

[6] *Dig.* xxvii. 9, 3 pr.; *Code*, vii. 8, 6.

[7] *Novels*, 136, 3. This hypothec was specially granted by Justinian to members of the Corporation of Bankers (*collegium argentariorum*); in general, a person with whose money anything was bought had no hypothec over it unless by express agreement (*Code*, viii. 14, 7; Hunter, 445).

preferred, in turn, according to the date of their security, to all those who were not so secured.[1]

In the case of ordinary hypothecs that were not tacit and privileged, preference was given to mortgages granted by public deed over those granted only by private document.

A public deed was one prepared by a notary (*tabellio*), and sealed in the presence of witnesses. A preference was also given by the Emperor Leo,[2] and continued by Justinian,[3] to a private deed if signed by three good and respectable witnesses.

SECTION 121.—TERMINATION OF RIGHTS UNDER PIGNUS AND HYPOTHECA[4]

Rights created under the contracts of *pignus* and of *hypotheca* were extinguished by (*a*) "solution" (*solutio*) or performance; (*b*) sale; (*c*) remission (*remissio*); (*d*) confusion (*confusio*); (*e*) destruction; or (*f*) prescription.

(a) *Solution.*—Extinction in this way signified performance of the obligation in security of which the pledge was given, or the hypothec was created. The debtor was not entitled to reclaim any part of the property pledged or hypothecated until the obligation had been entirely fulfilled,[5] by payment of the debt, and also all incidental expenses that were necessary and reasonable,[6] and any interest due upon the debt, unless there had been an express agreement (*pactum antichresis*) with regard to that;[7] until full solution had been made the creditor was entitled to retain the property.[8] If the debtor *in bonâ fide* offered payment to the creditor, and the latter refused to accept it, the hypothec was released by the consignation or deposit of the money in a sealed bag.[9]

(b) *Sale.*—The sale by the creditor of the subject pledged or hypothecated extinguished the obligation so far as the price realised by the sale sufficed to pay the debt; but the debtor remained liable to pay any balance of the debt that was not covered by the price obtained, and the creditor had a personal action against him in order

[1] *Code*, viii. 18, 9.
[2] *Code*, viii. 18, 11.
[3] *Novels*, 73, 1.
[4] *Cf.* Hunter, *Roman Law*, 4th ed., 445-447.
[5] *Dig.* xx. 1, 19; xiii. 7, 8, 1; *Code*, viii. 28, 6.
[6] *Dig.* xx. 6, 1 pr. See also *ante*, p. 355.
[7] *Dig.* xx. 1, 13, 6. See on *pactum antichresis*, *ante*, p. 354, note 5.
[8] See "Creditor's Right of Retention," *ante*, pp. 355 and 358.
[9] *Code*, viii. 25, 2. This was known by the expression *deponere consignatum*.

to recover the balance of debt still unpaid.[1] If, on the other hand, there was a surplus on the sale, the debtor was entitled to get it from the creditor after payment of the principal debt, interest, and expenses.[2]

(c) *Remission.*[3]—This was the voluntary release by the creditor of the subject pledged or hypothecated without payment having been either given or demanded, and it operated extinction of the obligation. Remission of a pledge or of a hypothec might be either express or implied.

Implied remission or release might be effected in such ways as (*a*) by the acceptance on the part of the creditor of some other security in place of the original one; for example, by taking a surety instead of the pledge;[4] or (*b*) by the creditor consenting to the sale of the hypothecated property,[5] unless while consenting to the sale the hypothec was expressly reserved;[6] or (*c*) by the creditor restoring the property to the debtor without asking or receiving payment of the debt, and with the intention (*animus*) of thereby releasing the security;[7] or (*d*) by the creditor returning to the debtor the title-deeds of the property that had been hypothecated.[8]

(d) *Confusion.*—The obligations under *pignus* and *hypotheca* were extinguished by "confusion" (*confusione*) in those cases when the rights of the creditor and the obligations of the debtor became confused or merged in the same person; as, for example, if the debtor became the heir of the creditor, or if the creditor became the owner of the property hypothecated, by purchase, or by any other legal mode of transfer.[9]

(e) *Destruction.* — The destruction of the property pledged or hypothecated extinguished the security and the rights and obligations in respect of it.[10] A mere change in the subject of security, however, did not operate extinction so long as its intrinsic character was not altered; thus, the pulling down of a house standing upon hypothecated

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[1] *Dig.* xii. 1, 28.

[2] *Dig.* xiii. 7, 42. See also *ante*, p. 355.

[3] Known specially in the Roman Law by the expression *remissio pignoris.*

[4] *Dig.* xx. 6, 5, 2.

[5] *Dig.* l. 17, 158. If the debtor had sold the hypothecated property, the mere fact of the sale did not of itself create any legal presumption of the consent of the creditor unless the sale had been properly advertised and had taken place with the creditor's knowledge and without any objection on his part (*Dig.* xx. 6, 8, 15; *Code*, viii. 26, 6). See Hunter, p. 446, and illustrative examples, *ibid.*

[6] *Dig.* xx. 6, 4, 1.

[7] *Code*, viii. 26, 9.

[8] *Code*, viii. 26, 7.

[9] *Dig.* xx. 6, 9 pr.; xiii. 7, 29.

[10] *Dig.* xx. 6, 8 pr.

ground did not cause the hypothec over the ground to cease to subsist;[1] and, similarly, if hypothecated ground that was uncultivated was to become cultivated, or built upon, the hypothec over the ground would continue unaffected thereby.[2]

(f) *Prescription.*[3]—If a third person, other than the debtor or his heirs, got possession of the thing pledged or hypothecated, and thereafter continued to possess it, in good faith, for the prescriptive period required by law, of ten or twenty years as the case might be, the creditor's "real" right in the property was thereby extinguished, and the defective title of the possessor was at the same time validated.[4]

[1] *Dig.* xx. 1, 29, 2.
[2] *Dig.* xx. 1, 16, 2.
[3] See on "Prescription," *ante*, Part III., Chapter V., p. 234 *et seq.*
[4] *Code*, vii. 36, 1, 2.

CHAPTER IX

The "Consensual" Contracts[1]

The "consensual" contracts or those created and completed by consent (*consensu*) alone formed the fourth of the classes into which Justinian divided obligations arising *ex contractu*.[2] The important element in the consensual contracts was the fact of the mutual consent of the parties, while the form in which the consent was expressed[3] and the actual presence of parties were immaterial and unimportant,[4] so long as the consent itself was sufficiently clearly expressed and given in return for a valuable consideration.[5]

The essential features of the "consensual" contracts were (*a*) that they were bilateral, and as such bound both parties; (*b*) that they were *bonae fidei* and not *stricti juris;* and (*c*) that they could be completed in the absence of parties, as by letter, or by messenger.

The contracts peculiar to the early Roman Law, such as the stipulation, were unilateral, while "commodate," "deposit," and "*pignus*" were only bilateral in the sense that they gave rise to "contrary" actions (*actiones contrariae*) only when one party had performed what he had undertaken, and only then were both parties bound. The "consensual" contracts, however, were not enforced by actions *stricti juris*, such as were proper to the contracts peculiar to the older Roman law, but by actions *bonae fidei*, or "of good faith," or, in other words, by actions having their origin and sanction in the Praetorian Edict, in which the issue was determined upon principles of equity and not upon the strict letter of the law.[6]

The "consensual" contracts, according to Justinian's classification,

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[1] Justinian, *Inst.* iii. 22-26; Gaius, *Inst.* iii. 135-162.

[2] See *ante*, pp. 290, 294, 298.

[3] Justinian, *ut supra*, iii. 22, 1.

[4] Justinian, *ut supra*, iii. 22, 2.

[5] The presence of a valuable consideration was the distinguishing characteristic of the Roman "consensual" contracts, but in the *Institutes* (iii. 22) this feature is not referred to, possibly because the gratuitous contract of mandate was included in the contracts *consensu* by Justinian, when it would more properly have been placed among the contracts *re*. *Cf.* Hunter, *ut supra*, 490 and 533; and see "Mandate," *post*, at p. 401).

[6] *Cf.* Sandars, *Institutes of Justinian*, 8th ed., 362.

were (1) sale (*emptio-venditio*); (2) hire (*locatio-conductio*); (3) partnership (*societas*); and (4) mandate (*mandatum*).[1]

SECTION 122.—THE CONTRACT OF SALE (EMPTIO-VENDITIO)[2]

The contract of sale, known in the Roman Law as *emptio-venditio*, is one by which a person promises to give or deliver to another person something in consideration of a price to be paid.

The price is the essential feature of the contract of sale; if one thing, other than a money price, is given in return for another thing there would not, thereby, be created a contract of sale (*emptio-venditio*) but one of exchange (*permutatio*). Sale and exchange were distinguished in the Roman Law in that the former was created *consensu*, while the latter was created *re*, the one party being bound to give the thing agreed upon only after the other party had already delivered the other thing.[3]

The person giving the property in the contract of sale was called the *venditor* or "vendor," and the person receiving thing agreed upon was called the *emptor* or "buyer"; the thing given was known as the *merx* or "merchandise," and the consideration given was styled the *pretium* or "price."

SECTION 123.—ESSENTIALS OF THE CONTRACT OF SALE

Three requisites are essential to the valid constitution of a contract of sale—namely, (1) the agreement of the parties; (2) a price; and (3) a subject to be sold.

(1) *The Agreement of Parties.*—The agreement of the parties in the contract of sale is to mutually give the thing sold for the price offered, and it may be either express or implied, written, or verbal, by letter, by an agent or messenger, or merely inferred from the conduct or oaths of the parties.[4] Although the contract of sale was in general completed

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[1] See as to the accuracy of including mandate amongst the consensual contracts, *post*, p. 404.

[2] *Dig.* xviii. 1; xix. 1; xxi.; Justinian, *Inst.* iii. 23; Gaius, *Inst.* iii. 139-141; *Code*, iv. 38-40. See also Moyle, *The Contract of Sale in the Civil Law*, 1892, Oxford; and Mackintosh, *The Roman Law of Sale*, 1892, Edinburgh. *Cf.* also Moyle, *Institutes of Justinian*, 4th ed., 429-435; Poste, *Institutes of Gaius*, 4th ed., 368-370; Hunter, *Roman Law*, 4th ed., 490-505; Mackenzie, *Roman Law*, 7th ed., 235-242; Sandars, *Institutes of Justinian*, 8th ed., 362-368; Buckland, *Principles of Roman Law*, 266-274; Cuq, *Institutions Juridiques des Romains*, ii. 400-423; Girard, *Manuel de Droit Romain*, 5th ed., 535-568.

[3] Cf. *Dig.* xix. 4, 1, 2.

[4] *Cf.* Justinian, *Inst.* iii. 22.

by the mere consent of parties expressed in any of these ways, yet the Justinianian law provided that if it was agreed between the parties that the contract should be reduced to writing the contract was not complete until that had been done, and either party might withdraw or resile without thereby incurring liability, up to the time of the formal execution of the contract.[1]

(2) *The Price or "Consideration"* (*Pretium*).—A price or "consideration" was not only necessary for the valid constitution of the contract of sale, but it was also its essentially distinctive feature.[2] The price, moreover, required to be (*a*) fixed in money; (*b*) definite; (*c*) real; and (*d*) sufficient.

(a) *Price Fixed in Money.*—Although it was essential that the price should be fixed in money,[3] or be capable of being ascertained in money,[4] the actual payment might be in goods of equivalent value,[5] or in some other equivalent; so, for example, a house might be sold for a fixed sum, but only a portion of that amount might be paid in actual money, and the buyer might perform for the seller some services equivalent in value to the unpaid balance of the price.[6]

(b) *Price Definite.*—The price was usually fixed by the parties, but they might competently agree to leave it to be fixed by a third party; such person's valuation, however, was only binding if it was certain.[7] If the third party could not or would not fix a definite price the contract was invalid, for in such a case its validity was conditional upon the price being definitely fixed by the third person. There would not be a good contract of sale constituted if the price was left to be fixed by the buyer himself.[8]

(c) *Price Real.*—It was essential that the price should be a real or actual one (*verum pretium*); the sale must not be merely a fictitious or a nominal one (*imaginaria venditio*),[9] and the price must be one intended to be paid and without receiving which the seller does not intend transferring his ownership,[10] although for any reason, such as special favour to the buyer, the price may be modified in amount.[11] If

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[1] Justinian, *Inst.* iii. 23 pr. *Cf.* Buckland, *Principles of Roman Law*, 274.

[2] *Inst.* iii. 23, 1.

[3] *Cf.* Justinian, *Inst.* iii. 23, 1; Gaius, *Inst.* iii. 140.

[4] Justinian, *Inst.* iii. 23, 2; Gaius, *Inst.* iii. 141.

[5] *Code*, iv. 44, 9.

[6] Cf. *Dig.* xix. 1, 6, 1.

[7] Justinian, *Inst.* iii. 23, 1; Gaius, *Inst.* iii. 140; *Code*, iv. 38, 15.

[8] *Dig.* xviii. 1, 35, 1; *Code*, iv. 38, 13.

[9] *Dig.* l. 17, 16. In such a case the transaction would be a gift, not a sale (*Dig.* xviii. 1, 36).

[10] *Code*, iv. 38, 3.

[11] *Dig.* xviii. 1, 38.

the consideration given was merely an imaginary or ostensible price not really intended to be exacted there was no true contract of sale.[1]

(d) *Price Sufficient.*—The price also required to be fair and reasonable (*justum pretium*), but mere insufficiency of price did not suffice to invalidate a contract of sale, when there was no question of fraud (*dolus*) involved.[2] By the Code of Justinian a seller had a right to rescind the contract and recover the property in those cases where the thing was sold for a price that was less than half its true value, unless the purchaser consented to make up the deficiency in the value.[3]

> The ground of this right in the seller was that of "lesion" or injury (*laesio*) or, as specially applied to the contract of sale, *laesio ultra dimidium*, and it arose from the erroneous idea that the price in a sale, in order to be a true one, ought to be equivalent to the value of the thing sold, whereas, in the absence of any fraud or bad faith (*mala fides*), the amount agreed upon by the parties is the essential thing, and constitutes a good price, however little proportion it may bear to the true value of the property. There were three cases in which a seller could not rescind the contract on the ground of lesion (*laesio enormis*), namely, (1) when the seller expressly waived his right; (2) when the sale was the purchase of a chance or hope of gain (*emptio spei*);[4] and (3) when the thing was sold at an under-value in terms of a testament under which the seller was the heir, or had derived benefit.
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> It has been suggested by some writers, but without authority, that the buyer might have a right of rescission corresponding to that of the seller, on the ground of excess of price unless the seller should consent to accept a fair price.

(3) *The Subject of the Contract of Sale.*—Stated generally, all things *in commercio* might be the subject of sale, unless specially forbidden by the law.[5] The *merx* or "merchandise," or subject, might be things corporeal and incorporeal, real rights, and personal rights; moreover, a "future" thing (*res futura*) not in existence at the time of the contract but which is expected to come into existence in ordinary course of time—such as a sown crop, and the unborn young of animals—and even a mere chance of future gain, such as a hope of succession, or of success in a lottery, might be the subject of a contract of sale.[6] Further, a *res aliena* or a thing belonging to some

[1] *Code*, iv. 38, 3.

[2] *Dig.* iv. 4, 16, 4.

[3] *Code*, iv. 44, 2, 8. This probably did not apply in those cases where the seller acted knowingly.

[4] See *post*, p. 369.

[5] *Dig.* xviii. 1, 72, 1.

[6] Cf. *Dig.* xviii. 1, 8. See on "Future Things," *post*, p. 369.

person other than the seller might even be the subject of a sale, for the mere fact that the person selling had no right to the subject as owner did not invalidate the sale; in such a case, however, the real ownership (*dominium*) was not transferred by the sale and the real owner (*dominus*) was therefore entitled to "vindicate" or claim his property; if he did so successfully the seller was liable to compensate the buyer for any loss that he had sustained through having been evicted from the property.[1] If, however, the buyer had bought the property in good faith and had subsequently acquired a title by prescription, or if the real owner had in any way ratified or homologated the sale, the thing could not thereafter be vindicated from the buyer by the true owner.

(a) *What could not be the Subject of Sale*

The following things could not form the subject of a valid contract of sale—namely, (1) things outside commerce (*res extra commercium*),[2] whether they were so placed either by reason of their nature, or through being forbidden by law; thus the law expressly prohibited the sale of free men and of stolen property (*res furtivae*); (2) non-existent things; these are either (*a*) things that have already existed but have now ceased to exist—such as a dead horse, or a house that has been destroyed; or (*b*) things which from the very nature of things cannot exist, such as a mythological animal. "Non-existent" things must be distinguished from "future" things, which are things that do not yet exist but will come into existence in ordinary future course of time, such as a crop that has been sown; (3) things that are already the property of the buyer (*res sua*); (4) the services, or labour, or skill of a person; these might be hired for a consideration but could not be sold for a price.

The sale of a non-existent thing was void if neither the seller nor the buyer knew that the subject of the sale had ceased to exist; if a price had already been paid it required to be restored to the buyer. If the seller alone knew that the subject was non-existent he was liable to compensate the buyer for any loss he might suffer owing to the seller's non-performance of the contract, and he was also bound to give back the price to the buyer if it had been paid. If, on the other hand, the buyer alone knew that the subject of the contract was non-existent he was liable to pay the price agreed upon, and had no remedy against

[1] *Dig.* xli. 3, 23, 1; *Code*, iv. 52, 5; viii. 45, 6; viii. 45, 23. See "Rights and Duties of Parties," *post*, pp. 374-381.

[2] See on "Things *Extra Commercium*," *ante*, Part III., Section 67 (h), and Section 68, p. 203 *et seq.*

the seller. If both seller and buyer knew that the subject was non-existent there was neither contract nor liability.

> It might, indeed, happen that the subject was only partially non-existent; in the case of the partial destruction of the subject of sale the buyer was still bound by the contract, but was entitled to a reduction of the price proportionate to the deterioration of the property, unless more than half of the subject had been destroyed, or the buyer could prove that the portion remaining, although exceeding half of the subject, was not that special part on account, or mainly on account, of which he had bought the property.

In the case of the sale of property that is already the property of the buyer (*res sua*), the rule of the Roman Law was that such a contract was void irrespective of whether the purchaser was aware of the fact or not; if, however, a price had been paid the purchaser could only recover it from the seller if he was ignorant of the fact that the subject was really his own property. There were some apparent exceptions to this rule, in certain circumstances; thus, for example, a man might be entitled to the legal possession of property belonging to another person, and the owner of the property might validly purchase that right of possession from him; or again, a man might be entitled to property if a certain condition should happen to be fulfilled, but rather than take the risk of the non-fulfilment of the condition he might validly purchase the property, and the subsequent fulfilment of the condition did not render the sale invalid, even although, as events turned out, it would have become his property in any case without the necessity of purchase.

SECTION 124.—SALE OF FUTURE THINGS (RES FUTURAE)

Res futurae, or "future things," were, as distinguished from "non-existent" things,[1] things that are not yet in existence but are likely to come into existence in the ordinary future course of events, such as, for example, the produce and fruits of land, or of animals, interest on money, and such like.

"Future" things might competently be the subject of a contract of sale, but the Roman jurists drew a distinction between the purchase of a mere chance or hope of future gain, and a purchase of something hoped for in the natural future course of events; this distinction was connoted by the expressions *emptio spei* and *emptio rei speratae*.[2]

Emptio spei signified, literally, "the purchase of a hope" or of a mere chance of future gain; it is the chance only that is purchased

[1] See *ante*, p. 368.

[2] Cf. *Dig.* xviii. 1, 8, 1.

and not the subject hoped for, which may not exist at the time of the purchase, and may never exist, there being only the hope and chance that it will exist; for example, a hope of inheritance (*spes successionis*), the hope of a catch of a fisherman's net, the hope of success in a lottery or sweepstake.

Emptio rei speratae was, literally, "the purchase of a thing hoped for," and not merely of the hope alone. The expression signified the purchase of an actual thing hoped for and expected in the ordinary and natural future course of events, such as a crop already sown but not yet sprung up, or the young of animals not yet born but about to be born (*nasciturus*).

> The distinction is further illustrated thus: "Either a proportionate price may be agreed to be paid on a greater or lesser number of things that may be actually realised, as 'so much a head for all the fish I catch to-day,' which is termed *rei speratae emptio;* or a definite sum may be agreed on as the price of the possibility of any number of things, more or less, being realised, as 'so much for the chance of all the fish I catch to-day'; and this was termed *spei emptio.*"[1]

In the case of the purchase of a mere hope the price was payable whether or not the subject eventually came into existence; but in the case of the purchase of an actual thing hoped for and expected the price was only payable in proportion to what was eventually forthcoming.

SECTION 125.—HOW THE CONTRACT OF SALE WAS CONSTITUTED

The contract of sale was complete as soon as parties had agreed upon the subject of the sale, and upon the price to be paid either as fixed by themselves or as determined by the arbitrament of a mutually agreed upon third person, without the necessity of their consent being expressed in writing, or in any special form of words. The agreement of parties upon the subject of the sale and the price was thus the date of the contract,[2] and when delivery was afterwards given, and the price paid, these events operated retroactively to transfer the ownership to the buyer.[3] This was due to the fact that the contract of sale (*emptio-venditio*) pertained to the *jus gentium*,[4] and was consequently unattended by any of the material symbols and formalities that characterised the contracts peculiar to the strict *jus civile;* as soon as

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[1] Sandars, *Institutes of Justinian*, 8th ed., 363. *Cf. Dig.* xviii. 1, 8, 1.
[2] *Dig.* xviii. 6, 8; *Code*, iv. 48, 1. *Cf.* Hunter, 284, 285.
[3] Cf. *post*, p. 373.
[4] See Part I., *ante*, p. 57.

there was agreement with regard to the subject and the price the contract was complete, and nothing required to be delivered, and no money required to be paid in order to create an obligation; the obligation having been created, the seller was thereupon bound to deliver the subject, and the buyer was, at the same time, bound to pay the price. Justinian, however, modified the existing law to the effect that if parties expressly agreed to put their contract in writing it would not be complete and binding until that had been done and the written agreement had been signed by the parties, until which time there was "room for repentance" (*locus poenitentiae*), and either party might withdraw from the agreement without thereby incurring any liability for breach of contract.[1] But if *arrhae* or earnest-money had been given the case was different, and, in such circumstances, whether the contract was written or unwritten, either the buyer forfeited the earnest or the seller had to restore double the *arrhae*, as the case might be, without the necessity of any express agreement on the subject.[2]

If the subject of the sale consisted of commodities that were ordinarily reckoned according to number, weight, or measure,[3] the contract was not complete until the numbering, weighing, or measuring, as the case might be, had taken place.

The agreement of the parties to the contract might be expressed either verbally or in writing, or it might be inferred from the acts of the parties, or from other facts and circumstances; the particular manner in which the consent was expressed was immaterial, provided the intention of parties was sufficiently clear.

(a) *Arrhae or Earnest-money*

It was a common Roman practice for the purchaser to give to the seller *arrhae* or earnest-money as an assurance of his good faith and of his intention to fulfil the contract and to pay the price; and it was forfeited if he failed to perform his undertaking. The *arrhae* possessed two characters: they might be either (*a*) merely confirmatory of the agreement,[4] or (*b*) an advance of portion of the purchase price. If the *arrhae* were not intended to be an advance of portion of the price, they required to be returned by the seller to the buyer upon the completion

[1] Justinian, *Inst.* iii. 23 pr.; Gaius, *Inst.* iii. 139; *Code*, iv. 21, 17. There is an apparent conflict between the terms of the *Institutes*, iii. 23 pr., and those of the constitution referred to in *Code*, iv. 21, 17. See upon the matter, Hunter, *Roman Law*, 4th ed., 504.

[2] Justinian, *Inst.*, *ut supra*, and other references, *ibid.*

[3] See "Fungible and Non-fungible Things," Part III., Section 67 (d), *ante*, p. 200.

[4] *E.g.* the buyer depositing his ring with the seller, as was very commonly done (*Dig.* xviii. 1, 35 pr.; xiv. 3, 5, 15).

of the sale.[1] Although the Roman Law attached much importance to *arrhae*, the giving of earnest was not essential to the contract of sale; it was, however, important as facilitating proof of a definite agreement having been made, while the risk of the forfeiture of the *arrhae* was naturally an inducement to the due performance of the undertaking.

Justinian made a great change upon the existing law by giving to the *arrhae* a new character, making them the measure of a forfeit in case either party wished to resile from the agreement, which they were entitled to do if they chose to incur the forfeit. The power to withdraw from the contract was given irrespective of whether the agreement was in writing or not; the extent of the buyer's liability was the forfeiture of the deposit, while that of the seller was forfeiture of double its value.[2]

SECTION 126.—INCIDENCE OF RISK IN THE CONTRACT OF SALE

The general rule of the Roman Law, apart from certain special exceptions, was that as soon as the contract of sale was completed the risk of the loss of, or damage to, the subject[3] (when the thing sold was a corporeal and definitely ascertained thing) passed to the purchaser,[4] unless the loss was occasioned by the fault of the seller—as by undue delay in giving delivery,[5] or by negligence—or parties had specially agreed otherwise. When there was no delay (*mora*) on the part of the seller, and he was not otherwise in fault, the buyer had not only to bear any loss of or damage to the subject, but was also bound to pay the price agreed upon, for his obligation to pay the price was a distinct obligation that was independent of what might happen to the thing sold.

Although the contract of sale was completed and dated[6] by the mutual agreement upon the subject and the fixing of the price, to the effect of creating reciprocal enforceable obligations, the ownership (*dominium*) was not thereby transferred but remained with the seller until he delivered the property to the buyer, or until the ownership had been passed either by the buyer having paid the price or given

[1] *Dig.* xix. 1, 11, 6; xviii. 3, 8.

[2] Justinian, *Inst.* iii. 23 pr. See, upon an apparent conflict between the *Institutes* and *Code*, iv. 21, 17, Hunter, 504.

[3] *I.e. periculum.* This term signified the risk or danger of any damage, including total loss, that might befall the subject of the contract (*merx*) after its completion, whether the loss was occasioned by human agency or by inevitable accident (*damnum fatale*).

[4] Justinian, iii. 23, 3; *Dig.* xviii. 6, 8 pr.; xviii. 1, 35, 4; *Code*, iv. 48, 4.

[5] Undue delay (*mora*) on the part of the seller in giving delivery after he was, or ought to have been, in a position to do so, was regarded as equivalent to negligence, which had the effect of transferring the risk of the thing (*periculum rei*) from the buyer back, as it were, to the seller.

[6] See *ante*, p. 370.

security for it, or having been allowed credit, or otherwise having satisfied the seller.[1] The obligation upon the seller to deliver the property was conditional upon payment of the price by the buyer, unless the former agreed otherwise,[2] and until the whole price was paid the seller held the property as if it were a pledge.[3] Although the risk passed to the buyer upon completion of the contract in the absence of any fault on the part of the seller, without the necessity of delivery,[4] the buyer was entitled to any additions to the subject that might have accrued between the time of the completion of the contract and the delivery of the subject by the vendor to the vendee, for the obligation upon the seller was to deliver the property to the buyer in the state in which it might happen to be at the time of delivery; any accretions to or diminutions of the subject in the interval between completion of the contract and delivery of the property were consequently immaterial to the seller, for they could neither benefit nor prejudice him; but during that time the seller was bound to show the care of a *bonus paterfamilias* in order to escape liability for negligence.[5] The date of the contract of sale being the agreement of parties upon the subject and the price,[6] the subsequent delivery of the property and payment of the price had the effect of retroactively transferring the ownership to the buyer; hence the buyer's right to fruits and accessions of the thing from the date of the sale, and also his liability for loss if the property perished without fault on the part of anyone, in virtue of the principle that a thing is lost to the owner (*res perit domino*).[7] There were three cases, however, in which the risk did not pass to the buyer immediately upon the completion of the contract, apart from either fault or agreement, namely, (*a*) when the subject sold was things reckoned according to weight, number, or measure; (*b*) when the property was sold subject to a condition; and (*c*) when the buyer had a choice of two things. In the first case the risk remained with the seller until the property had been specifically ascertained and appropriated to the contract;[8] if, however, "fungibles" were sold *per aversion* or "by lot" (or *en bloc*) for a slump sum,[9] and not at a fixed

[1] Cf. *Dig.* xiv. 4, 5, 18.

[2] *Dig.* xix. 1, 50; xviii. 4, 22.

[3] *Dig.* xix. 1, 13, 8.

[4] *Dig.* xlvii. 2, 14 pr.; Justinian, *Inst.* iii. 23, 3: *Periculum rei ad emptorem pertinat, dummodo custodiam venditor ante traditionem praestat* (*Dig.*, *supra*); *Periculum rei venditae statim ad emptorem pertinat tametsi adhuc ea res emptori tradita non sit* (*Inst.*, *supra*).

[5] *Dig.* xviii. 6, 3; xiii. 6, 5, 2. See "Duties of the Seller," *post*, p. 375, 376.

[6] *Dig.* xviii. 6, 8; *Code*, iv. 48, 1. Cf. *ante*, p. 370.

[7] *Cf.* Hunter, 285, 286.

[8] *Dig.* xviii. 1, 35, 5-7.

[9] *I.e.* a number of things in the aggregate for a single inclusive price.

price for each unit—such as all the wine in a particular cellar, or all the corn in a particular granary—the risk passed to the buyer at the date of the contract,[1] because nothing further required to be done to ascertain the subject or to put it into a deliverable state;[2] in the second case, the rule of the Roman Law was that the risk of *total* loss passed to the buyer only if and when the condition was fulfilled, but if when that event happened the property was not entirely destroyed, but was merely deteriorated, the loss fell on the buyer;[3] in the third case—that of an optional sale—the risk was transferred to the buyer only when he had made his choice; in this case, however, if one of the two things was destroyed before the buyer had exercised his option, the loss nevertheless fell upon him, because he was bound to take one of the two things in any case, and he was, consequently, liable to pay the price of the thing that remained.[4]

The general principles regulating the incidence of the risk in the contract of sale might competently be modified by the parties by special agreement; thus a seller might agree to be liable even for the accidental loss of the thing sold, or to be responsible only for misconduct (*dolus*), and not for due care or lack of diligence (*i.e.* for *culpa* and *diligentia*);[5] but parties could not, by any form of agreement, exempt themselves from liability for fraud (*dolus*).[6]

SECTION 127.—GENERAL DUTIES OF PARTIES IN CONTRACT OF SALE

Certain rights and duties pertained to, or were inherent in, the contract of sale, in the absence of any special agreement otherwise of the parties. Each party was bound to perform his part of the contract irrespective of performance by the other, and neither party could sue the other for non-performance if he himself had not either per-

[1] As to the date of the contract, see *ante*, pp. 370, 372, 373. *Cf.* the "Contract of Hire," *post*, p. 384 *et seq.* Where work was let "by the job" (*per aversionem*), or as a whole, the risk remained with the workman until approved by the employer; and work undertaken to be paid for according to measure remained at the risk of the workman until the measure was made (*Dig.* xix. 2, 36), unless the failure to approve was due to the fault of the employer, or the work was destroyed by *vis major* before approval or measurement (*Dig.* xix. 2, 37).

[2] Cf. *Dig.* xviii. 1, 62, 2; xviii. 6, 1; xviii. 6, 4, 2; Vat. Frag. 16.

[3] *Dig.* xviii. 6, 8 pr.; *Code*, iv. 48, 5. The principle of the rule was that if the thing sold did not actually exist when the condition was fulfilled, the seller could not fulfil his obligation, but if any part of it existed, in however bad a state, he could deliver it, and so perform his promise under the contract (*cf.* Hunter, 286). See also upon "Special Forms of Conditional Clauses in Contracts," *ante*, Section 111, p. 324.

[4] *Dig.* xviii. 1, 34, 6.

[5] *Dig.* xviii. 1, 35, 4.

[6] *Dig.* xiii. 6, 17. Cf. *Dig.* xix. 1, 6, 9.

formed, or been, in good faith, willing to perform his part of the contract. The parties might express their agreement in any form, so long as their mutual intention was sufficiently clear and definite, and so long as the terms of the contract were not contrary to law, morality, or public policy.

(1) *Seller's Duties*[1]

The primary duty of the seller was to deliver the subject sold to the buyer,[2] with all accessions,[3] unless these had been specially reserved by the seller, but the obligation upon the seller to deliver was conditional upon payment of the price by the buyer, or upon the seller being otherwise guaranteed, or satisfied.[4] The seller was not bound to give the buyer a good title as owner,[5] but merely such possession as would enable him to succeed in a possessory action;[6] on the other hand, however, the seller was held as guaranteeing to the buyer the free and undisturbed[7] and lawful possession[8] and enjoyment of what he had bought, which subjected him to a liability to compensate the buyer if the latter should have been legally evicted from the property, either in whole or in part.[9] It will thus be seen that a person who was not the owner, but had the legal possession of a thing, might enter into a valid contract of sale.[10]

The expression "eviction" signified not only the dispossession of the buyer by the true owner of the property, or by one who had a better title to it than the seller had had, but also the discovery by the buyer of servitudes or other burdens affecting the property which had not been disclosed to him.[11] In order, however, to render the seller liable for eviction, (*a*) the eviction must have been lawfully at the hands of a third person,[12] and the defect must have existed in the title at the date of the contract; (*b*) the eviction must not have been due to the buyer's own fault or carelessness; and (*c*) the seller must have had notice that the title was challenged,[13] unless the seller could not be

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[1] *Cf.* French Civil Code, Arts. 1602-1649.

[2] *Dig.* xix. 1, 11, 2.

[3] See on the reason for this, *ante*, p. 373.

[4] *Dig.* xviii. 4, 22; xix. 1, 50. See *ante*, p. 373.

[5] *Dig.* xviii. 1, 25, 1; xix. 4, 1 pr.

[6] *Dig.* xix. 1, 11, 3.

[7] *Dig.* xix. 1, 2, 1.

[8] *Dig.* xix. 1, 30, 1.

[9] *Dig.* xxi. 2, 35; xli. 3, 23, 1; *Code*, viii. 45, 6; iv. 52, 5. *Cf.* French Civil Code, Art. 1625.

[10] *Dig.* xviii. 1, 28.

[11] Mackenzie, *Roman Law*, 7th ed., 239, note 4; *Dig.* xviii. 1, 66 pr.; xix. 1, 30, 1; xxi. 2, 35.

[12] *Dig.* xxi. 2, 16, 1; xxi. 2, 51 pr.; *Code*, viii. 45, 15.

[13] *Dig.* xxi. 2, 53, 1; *Code*, viii. 45, 20; viii. 45, 8; viii. 45, 17.

found, or had expressly relieved the buyer from the necessity of notifying him.[1]

The measure of damages on eviction was the market value of the property at the time of eviction, which was the real amount of the loss suffered by the eviction, and not the price that had been paid by the buyer;[2] and the amount of damages payable by the seller might thus be greater or less, according as the property had increased or decreased in value;[3] but if the seller was, in good faith, ignorant of the defect in the title, he was not, in any case, liable for more than twice the price as compensation for the eviction.[4]

The seller was bound to take good care of the property during the period between the completion of the contract and the delivery of the subject; he was bound to show the care of a *bonus paterfamilias*,[5] but this liability for lack of sufficient care (*diligentia*), might be either increased or diminished by special agreement, or according either as the seller wrongfully delayed to deliver, or as the buyer wrongfully refused or delayed to take delivery;[6] in the latter case the seller was only liable for wilful misconduct or for gross negligence.[7]

If the seller wrongfully delayed to deliver, or was, in technical terms, "in delay" (*in mora*), he was liable for any loss that the buyer could show to be directly due to the delay, including accidental loss,[8] and the buyer was entitled to interest upon the purchase-money, if it had been already paid, from the time at which delivery ought to and could have been given by the seller. If both the seller and the buyer were *in mora* it was the same as if the buyer alone was in delay.[9]

(2) *Seller's Warranty*[10]

Although the seller was not bound to warrant the validity of the purchaser's title,[11] he was held as impliedly warranting the quality of the thing sold to the effect that it was free from any defects that would render it unfit for the use for which it was intended, or which would interfere with the buyer's possession and enjoyment of the property.[12]

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[1] *Dig.* xxi. 2, 63; xxi. 2, 56, 6; xxi. 2, 55, 1.

[2] Cf. *Code*, viii. 45, 23.

[3] *Dig.* xxi. 2, 70; *Code*, viii. 45, 9.

[4] *Dig.* xix. 1, 44. *Cf.* on Eviction, Hunter, *Roman Law*, 4th ed., 495-498.

[5] *Dig.* xviii. 1, 35, 4; xix. 1, 36. See also *ante*, p. 373.

[6] *Dig.* xviii. 6, 17; xviii. 6, 12.

[7] *Dig.* xviii. 6, 17.

[8] *Cf.* examples in *Dig.* xix. 1, 36; xviii. 6, 11; xix. 1, 54 pr., cited by Hunter at p. 495; and also French Civil Code, Arts. 1610, 1611.

[9] *Dig.* xix. 1, 51.

[10] *Cf.* French Civil Code, Arts. 1625-1649.

[11] See *ante*, p. 375.

[12] Cf. *Dig.* xix. 1, 11, 1; French Civil Code, Art. 1625.

Under the earlier law the warranty of quality was present only in cases of fraud or of express representation, but the later Roman Law of the Empire, under juristic interpretation, came to hold that a warranty of quality was implied in every sale with regard to defects that might be subsequently discovered but which could not have been discovered by examination at the time of sale;[1] and in this matter the law drew no distinction between an express warranty and a representation inducing the purchase; but a mere general recommendation did not subject the seller to any liability in respect of a warranty.[2]

> "Language of mere praise was scrupulously distinguished from promises intended to create a liability.[3] If a seller said his slave was steady you were not to expect the gravity and sobriety of a philosopher; if he said the slave was active and vigilant, it was not to be supposed that he worked night and day.[4] So if the slave was said to be an artificer you must only expect what was ordinarily looked for in an artificer."[5]

The seller, if he was aware of them, was bound to disclose to the buyer the existence of any defects (*vitia*); if he knew of any latent defect (*vitium*)[6] and did not disclose it he was guilty of fraud (*dolus*), and was held liable in an action on the sale (*actio ex empto*) for even consequential as well as direct loss;[7] if, however, the seller was in good faith, and did not know of the defect he was only liable for direct damage, but he was bound either to allow the contract to be rescinded or to pay compensation, if the buyer so preferred, in respect of his breach of implied warranty.[8]

When a seller had been guilty of a breach of the implied warranty the buyer might use either of two direct remedies known respectively as the *actio redhibitoria*, and the *actio aestimatoria* or *quanti minoris*.[9]

> The *actio redhibitoria* was an action at the instance of the buyer to have the contract rescinded, and to have the thing sold restored to the seller, with all its produce and accessories, if any, and to have the price returned to the buyer, with interest as an equivalent for the restoration

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[1] Cf. *Dig.* xxi. 1, 18; xxi. 1, 17, 20; Hunter, *Roman Law*, 4th ed., 501.

[2] Under the later Roman law, consequently, the maxim *caveat emptor*—"let the buyer beware"—did not apply.

[3] *Dig.* xxi. 1, 19.

[4] *Dig.* xxi. 1, 18 pr.

[5] *Dig.* xxi 1, 19, 4; Hunter, *ut supra*, 501.

[6] The term *vitium* signified such an inherent and permanent defect in the subject as was likely to impair its utility either in whole or in part.

[7] *Dig.* xix. 1, 13, pr.

[8] Cf. *Dig.* xix. 1, 13, 1. See, as to the manner in which the obligation in respect of an implied warranty came to form part of the contract of sale, Hunter, *ut supra*, 498-502.

[9] See *Dig.* xxi. 1; *Code*, iv. 58.

of the produce.[1] The seller required to restore the price before the buyer was bound to deliver back the thing sold.[2] This action was introduced by the Aedilician Edict.[3] It required to be brought within six months of the date of the contract, and could be brought by the buyer, or by any universal successor.[4]

The *actio aestimatoria* or *quanti minoris* was an action at law at the instance of the buyer in order to recover a proportion of the price paid equivalent to the difference between the actual value of the property with the defect (*vitium*) and its value as impliedly warranted. This action might be brought at any time within a year from the date of the contract, and its object was not to rescind the sale but merely to recover a proportion of the price; but it was, nevertheless, in the power of the judge to cancel the sale, in his discretion.[5]

The buyer, in all cases of breach of warranty, had the right to make his election between the *actio redhibitoria* and the *actio aestimatoria*.[6]

In addition to these two direct remedies by action for breach of warranty the buyer had also an indirect remedy; he might refuse to pay the price, and if the seller then sued him in a direct action upon the contract he might meet it with a defence (*exceptio*) based upon the warranty, whether express or implied, and the defect.[7]

Special Warranty.—Besides the implied general warranty of quality the seller might expressly give a warranty as to the possession by the subject of some special quality; in such a case the absence of such special quality would, on discovery, render the seller liable in damages for breach.

(3) *Buyer's Duties*[8]

In the absence of any special agreement otherwise the duties of the buyer that were inherent in the contract were threefold—namely, (1) to pay the price agreed upon; (2) to accept delivery; and (3) to pay any expenses which had been reasonably and properly incurred by the seller in the course of keeping the thing sold between the date of the contract and the delivery of the property.[9]

In the absence of any express agreement otherwise upon the matter the buyer was not entitled to delay payment of the price until it had first been demanded by the seller; his duty was to pay the price as

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[1] *Dig.* xxi. 1, 31, 2; xxi. 1, 23, 9; xxi. 1, 27; xxi. 1, 29, 2.
[2] *Dig.* xxi. 1, 25, 10; xxi. 1, 26.
[3] *Dig.* xxi. 1, 23, 7; xxi. 1, 60.
[4] *Dig.* xxi. 1, 23, 5; l. 16, 171; xxi. 1, 19, 5.
[5] *Dig.* xxi. 1, 43, 6.
[6] *Dig.* xxi. 1, 18, pr.; xxi. 1, 48, 2; xliv. 2, 25, 1.
[7] Upon warranty against defects, *cf.* French Civil Code, Arts. 1641-1649.
[8] *Cf.* French Civil Code, Arts. 1650-1657.
[9] Cf. *Code*, iv. 49 16; *Dig.* xix. 1, 13, 22.

soon as the contract was concluded upon the seller delivering, or offering, in good faith, to deliver the property, unless a particular future time for payment had been expressly specified, or the buyer had credit with the seller; for, as has been already stated,[1] the obligation upon the seller to deliver was conditional upon payment of the price. If the buyer did not pay on delivery by the seller and had not, at the same time, credit with the seller, he was liable to pay interest upon the price;[2] but if he had credit interest was only payable from the date when the credit ended. The buyer was bound to pay either with his own money, or with money of which he had the right to dispose, and so give the seller a good title to it.[3] Payment of the price with money belonging to the seller himself was no payment at all;[4] and similarly payment with money belonging to a third person, unless the buyer had the right to dispose of it, left the purchaser still liable to be sued by the seller for the price; for the seller, if he knew that the money neither belonged to the buyer nor was that of which he had the right to dispose, could not himself use the money without rendering himself liable for theft.

It was not necessary, however, that the buyer should himself pay the money; it was immaterial who actually delivered the money, so long as payment was made in the name and on account of the buyer, and with money of which the buyer had a right to dispose. Such a payment discharged the liability of the buyer, even although it had been made without his knowledge, or against his will.

The second main general duty of the buyer was to accept delivery of the property as soon as the seller was ready and able to deliver, whether that time was immediately upon the conclusion of the contract or at some later time agreed upon. If the buyer wrongfully refused to accept delivery, or wrongfully refused or delayed to take away what he had bought, the seller could compel him to do so by the *actio ex vendito*.[5]

SECTION 128.—SPECIAL DUTIES OF PARTIES IN CONTRACT OF SALE

It was quite competent for parties expressly to agree upon special rights and liabilities that did not ordinarily pertain to, and were not usually involved in, the contract of sale without special agreement to

[1] *Ante*, p. 373.
[2] *Dig.* xix. 1, 13, 20, 21.
[3] Cf. *Dig.* xix. 1, 11, 2.
[4] *Code*, iv. 49, 7.
[5] *Dig.* xix. 1, 9.

that effect; thus a seller might consent to make himself liable even for the accidental loss of the thing sold, or the parties might agree that the seller was only to be liable for *dolus* and not for lack of due care (*culpa*) and diligence (*diligentia*); so, also, a seller might expressly reserve rights, such as of usufruct,[1] or of "habitation,"[2] or the edible fruit (*pomum*),[3] or the quarries (*lapicidinae*),[4] or the property; or he might specially warrant the absence of any servitude right over the subject;[5] and what was known as *ruta-caesa, i.e.* things dug up (*eruta*), such as gravel, or lime, or things cut, such as trees (which did not ordinarily fall within the contract),[6] might be expressly included, and the seller might also expressly undertake to give sureties against eviction.[7] It was not competent, however, for parties to mutually agree that the seller was not to be liable for fraud (*dolus*),[8] so that, for example, if one man were to sell to another property which he knew was not his own, or in the knowledge that it was hypothecated to someone else, and if he at the time of the sale bargained that he was not to be liable in the event of the buyer being dispossessed or evicted, such an agreement would be void.

Just as special liabilities that were not ordinarily inherent in the contract of sale might be imposed upon the seller by special agreement, so also special liabilities might be similarly imposed upon the buyer; thus it might be expressly agreed that the buyer should give to the seller a right of pre-emption in respect of which he might undertake either not to sell the property to anyone except the seller, or to give to the seller an opportunity to purchase the subject before anyone else should have the chance to do so;[9] or the buyer might expressly undertake to subsequently let the thing sold to the seller at a fixed rent;[10] or property might be sold upon the express condition that it should not be used for particular purposes,[11] or that some particular act—such as, *e.g.*, manumission—should be done by the buyer with regard to it.[12]

These special liabilities were often imposed by formal stipulation,

[1] *Dig.* xix. 1, 7.
[2] *Dig.* xix. 1, 53, 2.
[3] *Dig.* l. 16, 205.
[4] *Dig.* xviii. 1, 77.
[5] *Dig.* l. 16, 90; l. 16, 169.
[6] *Dig.* xviii. 1, 66, 2; xix. 1, 17, 6.
[7] *Dig.* xxi. 2, 4 pr.
[8] *Dig.* xiii. 6, 17.
[9] Cf. *Dig.* xviii. 1, 75; xix. 1, 21, 5.
[10] Cf. *Dig.* xix. 1, 21, 4.
[11] Cf. *Code*, iv. 56, 3.
[12] Cf. *Code*, iv. 57, 6; iv. 55, 5; *Dig.* xviii. 7, 5.

especially when a penalty was added, but a mere oral agreement without stipulation was perfectly valid.[1]

Certain special conditional clauses which were frequently attached to the contract of sale for the special benefit of one or other of the parties under the names of *in diem addictio, lex commissoria, emptio ad gustum, pactum displicentiae, pactum de retro-vendendo* and *pactum de retro-emendo* have been already considered.[2]

SECTION 129.—TERMINATION OF CONTRACT OF SALE

The contract of sale was ordinarily terminated by specific performance, but it might also be rescinded in various ways,[3] as by (*a*) mutual consent of the parties; (*b*) non-performance or non-fulfilment of some essential condition; (*c*) error (*error*),[4] fraud (*dolus*),[5] force (*vis, metus*),[6] or other general ground of contractual nullity.[7]

Rescission or termination of the contract by mutual agreement was known as *contraria voluntas*, or, literally, "contrary will" or opposite intention. Such termination could only take place before either party had performed any part of his undertaking and while things were still intact,[8] nothing having been done as yet on the strength of the contract. In effect *contraria voluntas* amounted to a mutual undertaking by the parties that neither would sue the other for performance.

SECTION 130.—REMEDIES OF PARTIES IN CONTRACT OF SALE

(1) *Buyer's Remedies*

According to circumstances the buyer might enforce his rights as against the seller by the *actio empti, actio redhibitoria, actio aestimatoria* (or *quanti minoris*), and the *actio ex stipulatu* (or *condictio certi*).

The *actio empti* was the ordinary action arising out of the contract of sale by means of which a buyer could compel a seller either to perform his obligation under the contract or to pay compensation for his failure to do so. In order, however, to entitle the buyer to employ this remedy,

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[1] Hunter, *ut supra*, 504.
[2] See *ante*, Section 111, p. 324 *et seq.*
[3] See *Code*, iv. 44.
[4] See *ante*, Chapter V., Section 104, p. 307.
[5] See *ante*, Chapter V., Section 105, p. 310.
[6] See *ante*, *ut supra*.
[7] See "Essentials of a Valid Contractual Obligation," *ante*, Chapter V., p. 305.
[8] *I.e.* while matters were still *res integra*.

it was necessary that he should either have paid the price, or have, in good faith, tendered it.[1]

The *actio empti* was also competent for the enforcement of all special agreements or pacts (*pacta*) with reference to the contract.[2]

The *actio ex stipulatu* or *condictio certi* was the action competent when the promise in the contract had been constituted by a formal stipulation.

(2) *Seller's Remedy*

The seller could enforce his rights against the buyer by the *actio venditi*. The action was competent to the seller in all circumstances to compel a buyer to perform his obligations under the contract, whether these obligations were such as were inherent in the contract itself without the necessity of any special agreement, or were created in respect of special agreements or "pacts" (*pacta*) between the parties with reference to the terms of the contract.[3]

SECTION 131.—THE CONTRACT OF HIRE (LOCATIO-CONDUCTIO)[4]

In its general principles the contract of hire resembles that of sale, but it differs from sale just as ownership differs from possession and from mere temporary use.

The contract of hire is defined as a contract by which one person agrees either (*a*) to give to another person the use and enjoyment of some property, or (*b*) to do some work, in return for an agreed upon sum of money. The contract of hire is thus of two kinds—namely, (1) the hire of things (*locatio-conductio rerum*), and (2) the hire of services, (*locatio-conductio operarum*) or of work (*locatio-conductio operis*).[5]

Hire of things[6] was known in the Roman law as *locatio-conductio rei*

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[1] Cf. *Dig.* xix. 1, 13, 8.

[2] Cf. *Dig.* xix. 1, 11, 1.

[3] Cf. *Dig.* xviii. 1, 75; xix. 1, 11, 1. The *actio venditi* is also styled *actio ex vendito* or "the action arising out of something having been sold."

[4] Justinian, *Inst.* iii. 24; *Dig.* xix. 2; *Code*, iv. 65; Gaius, *Inst.* iii. 142-147. See also, on the "Contract of Hire" generally, Monro, C. H., *Locati-conductio* (*Dig.* xix. 2), Cambridge, 1891; Hunter, *Roman Law*, 4th ed., 505-516; Mackenzie, *Roman Law*, 7th ed., 243-247; Buckland, *Principles of Roman Law*, 274-276; Sandars, *Institutes of Justinian*, 8th ed., 368-372; Moyle, *Institutes of Justinian*, 4th ed., 436-440; Sohm, *Institutes of Roman Law*, 3rd ed., 404-406; Cuq, *Institutions Juridiques des Romains*, ii. 423-432; Girard, *Manuel de Droit Romain*, 5th ed., 568-575; May, *Éléments de Droit Romain*, 8th ed., 305-310. *Cf.* French Civil Code, Arts. 1708-1831. See also upon the distinction between the "Contract of Hire" and both *Precarium* and *Commodatum*, Sohm, *ut supra*, 334, note 5, and 376, note 1.

[5] *Cf.* French Civil Code, Art. 1708.

[6] See specially on the "Contract of Hire of Things," *post*, p. 384.

(sing.) or *rerum* (plu.), and it was a contract by which one person undertook to give the use and enjoyment of some property to another person, for a limited period, in return for and in consideration of an agreed upon sum by way of an equivalent for the use of the thing. There might in this way be let and hired, respectively, corporeal things, both movable and immovable, and also incorporeal things, such as a usufruct. The contract of hire of a thing is specially distinguished from sale in that the person who lets the thing has not the intention (*animus*) of permanently parting with the possession of it.

Hire of services or *of work* was known in the Roman Law as *locatio conductio operarum* or *operis* respectively, according as one person undertook to give his services to another person alone, or only to do a particular work or job for another person, in consideration of a certain sum of money (*merces certa*) by way of an equivalent for the services, or for the work, as the case might be.[1] In hire of services (*l.-c. operarum*) one person undertakes to supply another person with a certain amount (*quantum*) of labour; but in hire of work (*l.-c. operis*) one person agrees to supply another person not with labour but merely with the *result* of labour.

SECTION 132.—ESSENTIALS OF THE CONTRACT OF HIRE

The fact that was essential to the contract of hire—whether of things, or of services, or of work—was the consent of parties, however it might have been expressed so long as it was sufficiently clear. There required also to be a fixed sum (*merces certa*) agreed upon as a return or consideration for the enjoyment of the thing, or for the services, or for the labour, as the case might be; but such sum was in no sense a price but was merely an equivalent to the use and enjoyment of the thing, or to the services or to the labour respectively. It was not necessary that the whole of the agreed upon sum should be paid in money; it was competent to pay it partly in goods or in kind; thus a landlord might agree to accept a certain quantity of corn as a portion of the rent, provided that the amount of the rent had been already fixed.[2]

The consideration, however, required to be, in all the circumstances, something real and considerable, and not merely nominal or illusory;[3]

[1] When the person engaged to do the work also supplied the materials the law of Justinian, as had been the generally received opinion in the time of Gaius, regarded such an agreement as a contract of sale and not of hire. The ordinary case of hire of work (*l-c. operis*) was the employment by one man of another for an agreed upon sum of money to make something out of materials either belonging to or to be obtained by the employer. *Cf.* Justinian, *Inst.* iii. 24, 4; *Dig.* xix. 2, 2, 1; Gaius, iii. 147. See also *post*, p. 389, note 5. *Cf.* on this point the law of England in *Lee* v. *Griffin*, 30 L. J. (Q. B.) 252.

[2] Cf. *Dig.* xix. 2, 19, 3.

[3] Cf. *Dig.* xix. 2, 46; xix. 2, 20, 1; xxiv. 1, 52. In such cases there would be donation and not a letting for hire.

but, as in the contract of sale, the mere smallness of the consideration or rent was immaterial, and did not invalidate the contract if the parties seriously intended to make a real and not merely an apparent or fictitious contract of hire, and so long as the consideration was not induced or influenced by fraud (*dolus*).[1]

SECTION 133.—WHAT COULD BE THE SUBJECT OF THE CONTRACT OF HIRE

Everything that was *in commercio*, whether movable or immovable, and even incorporeal rights, as of usufruct, might be the subject of a contract of hire or letting, and even a portion of a person's services might be let. "Fungibles," however, or such things as are naturally consumed in the ordinary course of their use—such as, for example, wine, money, corn, fruit, or oil—are by their very nature unsuited to be the subject of hire unless they should have been expressly hired, not for consumption but merely for show or display; that, however, would be only a *quasi*-hire and was not *locatio-conductio* in the strict and proper sense.

SECTION 134.—HIRE OF THINGS (LOCATIO-CONDUCTIO RERUM)

In the contract of hire of things the letter of the property was known generally as the *locator*, and the hirer was similarly styled the *conductor*.[2]

(1) *Duties of the Letter (Locator)*

The contract having been completed by the mutual consent of the parties, the primary duty of the *locator* was to deliver the property to the hirer (*conductor*), and thereafter to allow him to retain the property during all the time agreed upon.[3] If no definite time had been fixed the letter was bound to permit the hirer to retain the property for such a time as would be, in the special circumstances, reasonably sufficient to accomplish the purpose for which the property had been hired. In order that the delivery of the property by the letter to the hirer should be complete it required to be of such a nature that the hirer could fully use and enjoy the property in the manner intended.

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[1] *Dig.* xix. 2, 22, 3; xix. 2, 23.

[2] A special phraseology was employed in certain cases to designate the parties; thus the hirer (*conductor*) of a house (*praedium urbanum*) was specially styled *inquilinus*, and the consideration or rent paid by him was known as *pensio*; similarly the hirer (*conductor*) of a farm or lands (*praedium rusticum*) was called *colonus*, and the consideration paid by him was styled *reditus*.

[3] Cf. *Dig.* xix. 2, 15, 1; xix. 2, 15, 8; xix. 2, 33.

A hirer was, by the Roman law, entitled to sub-let, or to let to any third person, the property that had been hired by him unless there was in the contract an express agreement otherwise.

The *locator* was also bound to maintain the thing let in such a state that the hirer could enjoy the full use of the property.[1] If the thing deteriorated in the course of reasonable use, and without fault on the part of the hirer, the letter (*locator*) was bound to repair it; and if he did not do so the hirer (*conductor*) might claim either to be released from the contract, or to have a reduction of the rent.[2] The repairs, however, for which the letter was responsible were such considerable ones as were necessary for the preservation of the property, or for its proper use and enjoyment, and not merely trifling repairs of a simple character, and necessarily incidental, more or less, to the enjoyment of the thing; these latter required to be executed by the hirer (*conductor*).[3]

The letter (*locator*) was also bound to guarantee to the hirer—as was the seller in the contract of sale—the peaceable enjoyment of the thing let during the period agreed upon,[4] and he was at the same time held as warranting the freedom of the property from faults or defects (*vitia*) which would render it unfit for the purpose for which it was let.[5]

A warranty, on the part of the letter (*locator*) of the fitness of the property for the use intended was implied in the contract; thus, for example, if a man let a building containing vats for making wine there would be an implied warranty that the vats were sound, so that, if they were really rotten, and the hirer lost wine or its value in consequence, the letter was liable to compensate him for the loss he had sustained on account of the breach of implied warranty.[6]

The letter of lands and houses was bound, at the end of the agreed upon period, to permit the hirer or lessee of the property, if he had duly fulfilled all his obligations under the contract, to carry away any movables that he had brought on to the land or into the building; and even to remove fixtures if the lessee expressly undertook that their removal would not injure the property or the fabric of the building, and that he would leave the property in as good condition as when he got it.[7] The *locator* was, moreover, bound to compensate the tenant of lands or property for the value of unexhausted improvements, provided the improvements were not part of the contract.[8]

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[1] Cf. *Dig.* xix. 2, 9 pr.; xix. 2, 33.
[2] Cf. *Dig.* xix. 2, 27.
[3] Cf. *Dig.*, *ut supra.*
[4] Cf. *Dig.* xix. 2, 7, 8, 9 pr. Upon "Eviction," see *ante*, p. 375.
[5] Cf. *Dig.* xix. 2, 19, 1.
[6] *Dig.*, *ut supra.*
[7] Cf. *Dig.* xix. 2, 19, 4.
[8] Cf. *Dig.* xix. 2, 55, 1; xix. 2, 61, pr.

The letter (*locator*) was liable to the hirer (*conductor*) for any failure to perform his obligations under the contract, but his liability naturally varied according as his failure was occasioned by his fault or otherwise.[1]

If non-performance of his obligation was due to the letter's own fault, he was bound to compensate fully the hirer (*conductor*) for the breach; thus, for example, if a man were to let a farm to another for a term of five years, but at the end of two years he sold the property to a third party who then evicted the lessee, the *locator* would be liable to compensate the *conductor* for his eviction,[2] because the sale of the property was his own voluntary act, and if he had not chosen to do so he would have been able to fulfil his original obligation by permitting the lease to run to the full term agreed upon.[3] But when the failure of the letter (*locator*) to perform his obligation to give undisturbed possession was not due to his own fault, the hirer (*conductor*) was not entitled to compensation but only to a remission of the rent or consideration,[4] as, for example, when a house that had been leased was accidentally burned without fault on the part of the lessee,[5] or the property let had been carried off by robbers.[6] On the other hand, however, if a landlord, for example, during the currency of a lease pulled down the house in order to rebuild it, he would be liable either to pay compensation to the tenant for his failure to give him the enjoyment of the property during the whole time fixed, or merely to allow him a remission of the rent proportioned to the time during which he was deprived of the use of the property, according as the demolition of the house was or was not necessary in all the circumstances.[7]

(2) *Duties of the Hirer* (*Conductor*)

The principal obligation of the hirer or lessee was to pay the rent or

[1] Cf. *Dig.* xix. 2, 30 pr.; xix. 2, 25, 1.

[2] Cf. *Dig.* xix. 2, 25, 1.

[3] According to the Roman Law, the purchaser of property that was, at the time of the sale, already let to another person was not bound by the terms of the lease, because he was not a party to it, and the contract of hire did not create a "real" right in the subject but only a personal obligation. The purchaser was entitled, consequently, to evict the lessee (*conductor*, *inquilinus*, *colonus*). It was usual, however, in practice, in order to obviate the risk of the eviction of the lessee, to stipulate that the purchaser was to be bound by any existing leases of the property. Cf. *Dig.* xix. 2, 25, 1; *Code*, iv. 65, 9.

[4] Cf. *Dig.* xix. 2, 30, pr. 1.

[5] If, however, there had been a special agreement against the use of fire by the hirer, the accidental loss of the property by that means not only rendered him liable for the loss, but would also deprive him of any claim to remission of the rent. Cf. *Dig.* xix. 2, 11.

[6] Cf. *Dig.* xix. 2, 34; see also *post*, p. 388.

[7] Cf. *Dig.* xix. 2, 35 pr.

consideration agreed upon at the time fixed, and if he fell into arrear he was liable to pay interest upon it.[1]

The sum paid as rent or consideration, whether under the name of *merces*,[2] *pensio*,[3] or *reditus*,[3] represented the equivalent of the hirer's enjoyment of the thing; and, therefore, if from any good cause he was prevented from having the enjoyment of the thing or subject let, he was not liable to pay rent for the period during which he had not the enjoyment of the property. It was, however, one of the duties of the hirer, inherent in the contract, in the absence of special agreement otherwise, to keep possession of the property let for the whole period fixed, and he was not freed from liability to pay the agreed upon consideration if he chose to leave the property before the fixed time without reasonable ground for doing so.[4]

The rent or consideration was usually paid in money; but the Roman Law permitted the rent of land to be paid in fruits or produce, provided the amount had been fixed. The fruits of lands[5] were subject to the tacit hypothec of the owner in security of the rent, and similarly the landlord of urban subjects[6] had a tacit hypothec over the tenant's movable property.[7]

> The tenant of a farm was specially entitled to a remission of his rent if his whole crop was destroyed by an unforeseen and extraordinary calamity,[8] such as an inundation or a hostile irruption; but the nature of the disaster required to be exceptional;[9] and, moreover, if, during the remainder of the term of the lease, unusual fertility compensated the tenant for his loss, he was liable to pay to the landlord the amount of the rent that had been remitted.[10]

The hirer or lessee was also bound to take all reasonable care of the thing hired,[11] and to use it properly; he required to keep it in good condition and employ it only for the purpose for which it was let,[12] but he

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[1] Cf. *Dig.* xxii. 1, 17, 4; *Code*, iv. 65, 17.

[2] See *ante*, p. 383.

[3] See *ante*, p. 384, note 2.

[4] Cf. *Dig.* xix. 2, 24, 2; xix. 2, 55, 2; xix. 2, 27, 1.

[5] *Praedia rustica.*

[6] *Praedia urbana.*

[7] Cf. *Dig.* xx. 2; xx. 2, 14, 4 pr. See also *ante*, "Tacit Hypothecs," Section 120, p. 359.

[8] *Dig.* xix. 2, 15, 2-4.

[9] *Dig.* xix. 2, 25, 6.

[10] *Dig.* xix. 2, 15. *Cf.* somewhat analogous provisions of the French Civil Code, Arts. 1769, 1770.

[11] *Cf.* Justinian, *Inst.* iii. 24, 5; *Dig.* xix. 2, 25, 3, 7.

[12] If he used the property for a purpose other than that for which it was let, he would, in such a case, be guilty of a "theft of the use" (*furtum usus*). *Cf.* the "Contract of Commodate," *ante*, p. 339, and Gaius, *Inst.* iii. 196, 197.

was not liable for unavoidable accident whether in the form of *damnum fatale* or of *vis major*.[1] Thus he was not liable for loss occasioned by natural phenomena, or if he was violently despoiled of the property by robbers, because both of these cases involved the exercise of superior force against which the utmost care would not have availed;[2] but he was not freed from liability by reason of the property having been stolen, because the fact that it had been possible to commit the theft without observation raised a presumption of lack of sufficient care.[3]

The final duty of the hirer or lessee was to restore the thing hired at the term fixed. Even although the hirer might claim the property as truly belonging to himself he was bound, in order to fulfil his obligation under the contract of hire, to give up its possession; but he might thereafter vindicate his ownership by an ordinary action for its recovery.[4]

These duties of the hirer (*conductor*) as well as those of the letter (*locator*) which have been mentioned were ordinarily inherent in the contract without the necessity of special agreement, but they might be either modified or extended by the express consent of the parties. Thus, if it had been expressly agreed that a farm should be cultivated in a particular way the tenant might be ejected, and the farm be let to another, if he failed to comply with the special terms of the contract.[5]

Section 135.—Termination of the Contract of Hire of Things

The contract of hire of things usually terminated by the expiry of the period fixed for the use and enjoyment of the thing hired.[6] If no time had been definitely fixed the contract ended by the lapse of such time as was reasonably necessary, in all the circumstances, to accomplish the purpose for which the property had been hired. The

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[1] Justinian, *Inst.*, *ut supra*. Cf. *Code*, iv. 65, 28.

[2] *Dig.* xix. 2, 9, 4.

[3] *Cf.* Justinian, *Inst.* iv.

[4] *Code*, iv. 65, 25. Cf. *Code*, iv. 65, 32.

[5] Cf. *Dig.* xix. 2, 51 pr.; xix. 2, 11—an example of a special agreement against the use of fire by the hirer rendering him liable if loss was accidentally so caused.

[6] *Code*, iv. 65, 11. If a tenant was permitted by the landlord to continue in possession of the property after the period for which the lease had been granted had expired, there was presumed to have been a "tacit relocation" or implied re-letting of the property. In the case of lands the implied renewal of the lease was considered as from year to year upon the same conditions as before. In the case of houses relocation was not presumed if the original lease was in writing, and could only be effected by writing, in the absence of which the tenant was considered as holding the property merely during the pleasure of the owner. While tacit relocation renewed, for the time, all the ordinary terms and conditions of the lease, the obligations of a surety were not renewed thereby. *Cf.* Hunter, 514, and Mackenzie, 245.

contract might also end by the sale,[1] or by the loss or destruction of the property, or by it unavoidably becoming unfit for the purpose for which it was hired, or by reason of the ejection of the lessee before the lapse of the time fixed in the contract, either because of his failure to pay the rent agreed upon,[2] or for making an improper or damaging use of the property.[3] But the contract of hire of things was not terminated by the death of either the hirer or the letter during the time fixed, and their respective rights and duties passed to their heirs upon the same terms.[4]

SECTION 136.—HIRE OF WORK AND HIRE OF SERVICES (LOCATIO-CONDUCTIO OPERIS; LOCATIO-CONDUCTIO OPERARUM)

The general principles applicable to the contract of hiring of things (*locatio-conductio rerum*) applied for the most part to the hiring of work or of services.

A person might engage another person either to execute some particular piece of work for him by reason of the possession of special skill, or he might employ another person to give him his whole services during an agreed upon time.

If a person undertook to do some special work for another person, for a consideration—to employ, in other words, his skill or his labour upon materials supplied by that other person[5]—there was created in such a case, according to the Roman Law, a contract of "hire of work" (*locatio-conductio operis*). The person who undertook to do the work—who was the employee—was regarded by the Roman jurists as the hirer or *conductor* of the work, while the person who employed him—*i.e.* the employer—was considered as the letter or *locator* of the work to be done.[6] Thus, a laundress was regarded as the *conductor*, while

[1] In such a case the buyer was not considered bound by the contract, but the hirer could claim compensation from the letter. The right of the *conductor* was purely a personal one against the *locator* in respect of the dispossession. The right of a usufructuary, on the other hand, was a "real" servitude right, the usufruct itself being part of the property. Cf. *Code*, iv. 65, 9; and also *ante*, p. 386, note 3; and Sandars, *Inst.*, 372.

[2] *Dig.* xix. 2, 54, 1.

[3] *Code*, iv. 65, 3. It was also peculiar to leases of houses that the lessee might be ejected before the term fixed, if the proprietor wanted the house for his own occupation (*Code*, *ibid.*).

[4] Justinian, *Inst.* iii. 24, 6; *Code*, iv. 65, 10. See *post*, p. 393.

[5] In the case where the workman also supplied the materials upon which his labour or skill was to be expended, the contract was regarded by the Romans as one of sale and not one of hire. See Justinian, *Inst.* iii. 24, 4; Gaius, iii. 147; *Dig.* xix. 2, 2, 1; also *ante*, p. 383, note 1.

[6] Cf. *Dig.* xix. 2, 13, 5; xix. 2, 59; xix. 2, 62.

the owner of the clothes being washed by her was the *locator operis;* a fuller of clothes was the *conductor*, the owner of them was the *locator;*[1] a carrier of goods was the *conductor*, and the owner of the goods carried was the *locator operis;*[2] a jeweller, or a builder executing work, or expending labour upon materials supplied by the other, was the *conductor* of the work, and the person with or upon whose materials the work was to be done was the *locator operis.*[3]

> In the case, however, of a builder contracting to build a house upon the ground of the other party and at the same time to furnish the necessary materials the rule was different. The ground being the principal thing, the building and its materials merely acceded to it, on the principle that "a building accedes to the land" (*aedificium solo cedit*). The proprietor of the ground was thus the letter (*locator*) of the real thing upon which the builder was to expend his labour, and which the latter consequently hired for that purpose. This case is also differentiated from that of the workman supplying both the materials and the labour which, as has been already seen, was regarded by the jurists as truly a sale.[4]

The reason why the Roman jurists spoke of the person who gave out the work, or contracted for the work to be performed, as the *locator*, and the person who undertook to do the work as the *conductor*, was because they looked at the work itself that was to be done as a whole, and did not consider the labour that was to be expended in doing the work; if they had done so the person doing the work and expending the labour would naturally and properly be regarded as letting out his services for the execution of the work—*i.e.* as the *locator*—and the other person as hiring these services for its performance—*i.e.* as the *conductor.*[5]

The usage of the Roman jurists with regard to the relations of parties in the case of a hire of work, or the expending of labour in respect of some particular thing, while distinct and uniform throughout, proceeds upon a confusion between that case and the entirely distinct case of a letting or hiring of things for use (*locatio-conductio rerum*), which would not have arisen if they had regarded payment as the essential criterion; for just as the tenant of property pays for its use and is the hirer (*conductor*) of it, so a person who sends his child to be taught pays for, and thereby hires, and is the *conductor* of the services of the teacher, which the latter lets to him.[6]

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[1] Cf. *Dig.* xix. 2, 13, 6; xix. 2, 60, 2.
[2] Cf. *Dig.* xix. 2, 11, 3.
[3] Cf. *Dig.* xix. 2, 13, 5; xix. 2, 59; xix. 2, 62; Hunter, 511.
[4] *Ante*, p. 383, note 1.
[5] *Cf.* Sandars, *Institutes of Justinian*, 8th ed., 369.
[6] See Hunter, *Roman Law*, 4th ed., 511, 512.

As distinguished from a "hire of work" (*locatio-conductio operis*) there was said to be a "hire of services" (*locatio-conductio operarum*) when a person let his services solely to another person. In such cases the person whose services were thus employed—*i.e.* the employee—such as a secretary, or a domestic servant, or a labourer, was the *locator* or letter of the services, and the person to whom the services were to be alone rendered—*i.e.* the employer—was the *conductor* or hirer of them.

The distinction between *locatio-conductio operis* and *operarum* arises when the work or services are rendered either in connection with a particular thing or generally; but in order to avoid the confusion caused by the different aspects in which the Roman jurists regarded the relations of parties, according as it was a "hire of work" or a "hire of services," it is advisable to speak of the "employer" and "employee." The employer is the person for whom the work is done, whether generally or in particular, and he was either the *conductor operarum* or hirer of services, or the *locator operis* or letter of work, as the case might be; while, similarly, the employee is the person doing the work, whether general or special, and he was either the *locator operarum* or letter of services, or the *conductor operis* or the hirer of work, as the case might be.

(1) *Duties of the Employee or Workman (Locator operarum; Conductor operis)*

In a contract of hire of work (*locatio-conductio operis*) the principal duty of the employee or workman was to perform the work properly, and in the way agreed upon, within a reasonable time, if no time had been definitely fixed.[1]

If the workman was unavoidably prevented, as, for example, by illness, from performing the work he was not entitled to the agreed upon payment for his services, but, at the same time, he was not liable for damages by reason of his failure to do the work.

If, however, the employee's failure to do the work was due either to negligence or to lack of skill he was liable to compensate the employer, who, according to the Roman theory, had let the work to him, for his non-performance, because the contract implied and required that the workman should apply to the work both sufficient care and sufficient skill. If the workman does not possess sufficient skill he ought not to undertake the work, but having once done so he was liable for the consequences; and, moreover, in such circumstances he was not entitled to payment for his services.

A person who undertook to do work requiring special skill, and who knew, or ought to have known, that want of reasonable care or

[1] Cf. *Dig.* xix. 2, 51, 1; xix. 2, 58, 1; xix. 2, 60, 3.

skill would cause danger to others, was liable, under the Aquilian law (*Lex Aquilia*) for any damage that might be caused by reason of his want of skill. Thus, a doctor who neglected to attend to a patient so that he, in consequence, died,[1] or who unskilfully performed an operation, or through lack of skill prescribed wrong remedies,[2] was liable for fault (*culpa*). Lack of reasonable skill was regarded as equivalent to *culpa* or fault, and the liability in consequence was expressed in the legal maxim *imperitia culpae adnumeratur*;[3] the fault consisted in undertaking work which the person knew, or ought to have known, he was not competent to perform.

Under the contract of hire of work (*locatio-conductio operis*) it was the duty of the person to whom the work was entrusted for the exercise of his skill—that is, the employee or *conductor* of the work—to take good care of the subject; and therefore if the property so entrusted to him were lost or destroyed through his negligence or through his lack of skill, he was liable for the loss. He was not liable, however, for loss or damage caused by "superior force" (*vis major*), such as robbery, or arising from intrinsic faults in the thing itself upon which he was working, or from inevitable accident (*damnum fatale*).

The employee or workman might competently, by express agreement with the other party, either extend or limit the legal liability ordinarily inherent in the contract, either with regard to the subject of the contract, or to the manner in which the work was to be performed. Thus, he might agree to be responsible for loss caused by accident,[4] or he might agree that the quality of the work done was to be estimated by the employer; in such latter case, however, the standard of judgment was not an arbitrary one, but was that of a reasonable man.[5]

A person might undertake to do work *per aversionem* or as an entire job, which signified that the whole work was to be done for a fixed and inclusive sum, and was to be delivered as a whole after its completion; this is in contrast with work undertaken to be done at so much for each portion completed, or for each day's work (*per diem*).[6] In the case of a hire of work *per aversionem* (or *aversione*) the risk of loss or injury did not pass to the employer until the whole work had been completed and approved, but if the work was to be performed by the piece or by measurement the risk (*periculum*) passed to the

[1] Justinian, *Inst.* iv. 3, 6; *Dig.* ix. 2, 8 pr.

[2] Justinian, *Inst.* iv. 3, 7; *Dig.* ix. 2, 7, 8; ix. 2, 8 pr.; l. 17, 132.

[3] *Dig.* l. 17, 132.

[4] Cf. *Dig.* xix. 2, 13, 5.

[5] *Dig.* xix. 2, 24 pr.

[6] *Cf.* a sale *per aversionem*, see *ante*, p. 373, and p. 374, note 1. *Cf.* also *Dig.* xix. 2, 35 pr.; xix. 2, 51, 1.

employer (*locator*) whenever each piece was completed, measured, and approved.[1]

In these cases there was a presumption that before completion or approval the work was lost through the fault of the employee (*conductor*) while the subject was still in his hands, but this presumption might be overcome on the part of the employee by proof that the loss was accidental, or unavoidable, or had been caused by defects in the thing itself that had been supplied by the employer (*locator*), or otherwise through the fault of the employer; and in such circumstances the risk (*periculum*) was upon the *locator* or employer. Thus if loss or injury was occasioned before the work had been measured or approved, and, at the same time, the failure to measure or approve had been due to the fault of the employer, the risk was thereby transferred from the workman or employee to the employer. Moreover, if before approval the subject was lost by *vis major*. or by accident, without any negligence, the loss fell upon the employer, because the workman was not responsible for more than his own care and skill.[2]

(2) *Duties of the Employer* (*Locator operis; Conductor operarum*)

The primary duty of the employer, whether in the character of the letter of work or the hirer of services, was to pay the sum agreed upon as the consideration for the work or for the services, unless owing to the fault of the employee the services promised had not been rendered.[3] If the amount fixed was not paid timeously interest became due upon it.[4]

SECTION 137.—TERMINATION OF THE CONTRACT OF HIRE OF WORK, AND OF SERVICES

The contract of hire of work, and of services generally, ended in either of two ways—namely, (*a*) by the completion of the work undertaken to be performed, or (*b*) by the expiry of the period agreed upon. Moreover, in the case both of a contract to give services (*locatio-conductio operarum*), and of one to do some work (*locatio-conductio operis faciendi*), the death of the person giving his services—that is, the employee or workman—had the effect of terminating the contract. In the case of a contract of hire of things (*locatio-conductio rerum*), however, the obligations under the contract were not ended by the death

[1] Cf. *Dig.* xix. 2, 36; xix. 2, 37; xix. 2, 60, 3; xix. 2, 62.
[2] *Dig.* xix. 2, 37.
[3] Cf. *Dig.* xix. 2, 38 pr.
[4] *Code*, iv. 65, 17.

of either the *locator* or the *conductor* but passed to their respective representatives.[1]

SECTION 138.—THE CONTRACT OF PARTNERSHIP (SOCIETAS)[2]

Partnership is a contract by which two or more persons agree to combine their property or their labour, or both, for the sake of gain or profit.[3] The Roman contract of *societas* was not confined to sharing the profits of a business, but extended to any sharing of profits or losses as the result of agreement between the parties, whether these profits or losses arose in business, or trade, or otherwise, and even included co-ownership when that had been created by agreement.[4]

In the *Institutes*[5] Justinian, following the arrangement of Gaius,[6] divides partnership into two great classes according as it was either of a general character or for a particular purpose.[7] In the *Digest*, however, five different kinds of partnerships are distinguished,[8] namely :— (1) *Societas universorum bonorum ;* (2) *Societas universorum quae ex quaestu veniunt ;* (3) *Societas negotiationis alicujus ;* (4) *Societas vectigalis ;* (5) *Societas rei unius.*

Societas universorum bonorum, or "a partnership of all goods," was one in respect of which everything belonging to each partner, at the time of the contract and subsequently accruing to him, in whatever way it might have been acquired, was held by the partners, and enjoyed by them in common. Under such a form of contract everything that belonged to each partner at the date of the contract became partnership property without the necessity of delivery or transfer,[9] but property that was subsequently acquired required to be specially conveyed.[10]

Societas universorum quae ex quaestu veniunt was "a partnership of all

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[1] Justinian, *Inst.* iii. 24, 6 ; *Code*, iv. 65, 10 ; see *ante*, p. 389.

[2] See Justinian, *Inst.* iii. 25 ; Gaius, *Inst.* iii. 148-154 ; *Dig.* xvii. 2 ; *cf.* French Civil Code, Arts. 1832-1873. See also on the "Contract of Partnership" generally, Hunter, *Roman Law*, 4th ed., 516-524 ; Mackenzie, *Roman Law*, 7th ed., 248, 249 ; Moyle, *Institutes of Justinian*, 4th ed., 441-446 ; Buckland, *Principles of Roman Private Law*, 276-281 ; Sohm, *Institutes of Roman Law*, 3rd ed., 406, 407 ; Sandars, *Institutes of Justinian*, 8th ed., 372-377 ; Cuq, *Institutions Juridiques des Romains*, ii. 438-444 ; Girard, *Manuel de Droit Romain*, 5th ed., 575-581 ; May, *Éléments de Droit Romain*, 313-317.

[3] *Cf.* the definition of partnership in the French Civil Code, Art. 1832.

[4] See *Societas rei unius* (*vel certarum rerum*), *post*, p. 395.

[5] Justinian, *Inst.* iii. 25 pr.

[6] Gaius, *Inst.* iii. 148.

[7] *Cf.* French Civil Code, Art. 1835 : "Partnerships may be either universal or affecting only certain property."

[8] *Dig.* xvii. 2, 5-7.

[9] *Dig.* xvii. 2, 1, 1-2.

[10] *Dig.* xvii. 2, 74.

things which came from the exercise of skill or labour,"[1] or, in other words, a professional or trade partnership in which the partners share the profits gained by each in the course of carrying on business transactions. The special nature of this form of partnership consequently excluded from its application property belonging to the individual partners that had not been applied to the partnership purposes, and property that was acquired by the partners in ways other than in the course of business, as, for example, by succession, by gift, or by bequest.[2]

Societas negotiationis alicujus was a partnership entered into for and limited to a particular transaction—such as to sell certain property[3]—and only continued until the completion of the particular transaction.[4]

Societas vectigalis was a partnership formed for the purposes of farming the revenue. It was a variety of *societas negotiationis alicujus*, but it was governed by certain special rules.[5]

Societas rei unius (*vel certarum rerum*), or "a partnership of one thing," was a partnership formed in relation to one thing; it was a form of joint ownership.[6] Property might be owned jointly either by agreement of parties, or by reason of some act or event independent of the will of the parties, as, for example, when property is bequeathed by a testator to several persons jointly. In the former case there would be true partnership, because there is present the element essential to a proper partnership, namely, the mutual choice of a person (*delectus personae*); but in the latter case they have been accidentally brought into association with each other by the act of a third person and without any knowledge or agreement on their part, so that, consequently, there is no true partnership.

> The distinction between the ways in which joint ownership might arise was indicated by the different ways in which the rights of joint owners might be enforced according as the joint ownership was either (*a*) of consent, or (*b*) by law. If the joint association of parties had been brought about by their consent the appropriate remedy was the *actio pro socio*, which was the ordinary mode in which partners insisted on their rights against each other; but if, on the other hand, the joint ownership had arisen from operation of law and independent of their consent, the competent actions were the *actio communi dividundo* or the *actio familiae erciscundae*.[7]

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[1] The term *quaestus* signified commercial and professional profit (cf. *Dig.* xvii. 2, 7-8). This special form of the contract is also styled either *societas quaestus et lucri* (*Dig.* xvii. 2, 13), or *societas quaestus et compendii* (*Dig.* xxix. 2, 45, 2).

[2] Cf. *Dig.* xvii. 2, 7-9; xvii. 2, 71, 1; xxix. 2, 45, 2.

[3] Cf. *Dig.* xvii. 2, 5 pr.

[4] Justinian, *Inst.* iii. 25, 6.

[5] See *Dig.* xvii. 2, 59.

[6] Cf. *Dig.* xvii. 2, 31.

[7] *Dig.* xvii. 2, 34.

The ordinary professional or trade partnership (*societas universorum quae ex quaestu veniunt*) was the most usual one, and was the kind that was ordinarily understood if no other form was clearly agreed upon.[1]

SECTION 139.—CONSTITUTION OF PARTNERSHIP

The contract of partnership was constituted by simple consent of parties, whether verbal or in writing, and by the law of Justinian might be contracted conditionally,[2] although, previous to that time, the point had been undecided.[3] But a partnership could not be validly entered into to last for ever (*in aeternum*),[4] because such an agreement might be equivalent to compelling a person to remain a partner against his will, and consent was of the essence of the contract.[5]

In order validly to constitute partnership it was requisite that the purpose of the contract should be lawful, and not contrary to either public morals or public policy,[6] and also that each partner should contribute either property, or services, or both;[7] one partner, however, might contribute all the capital and the other merely services and both share the profits, for a man's services to the partnership might be so valuable as to be equivalent to capital.[8]

Each partner's share of the profits of the partnership was not necessarily proportionate to the amount of capital contributed by him, but might be fixed in various proportions by express agreement;[9] the amount of capital contributed by each partner was not necessarily equal, but was also fixed by agreement. There was no necessary correlation between the amount of capital contributed by each partner and his share of the profits, or proportion of the losses of the partnership, each of these matters being the subject of separate agreement; but if the proportion of profit or of loss attaching to each partner had not been specially agreed upon the shares were regarded as equal—that is, each partner would either obtain, or be liable for, an equal share of the whole profit or loss, as the case might be, and not merely a share proportionate to his contribution to the partnership.[10]

If either the share of profit, or of loss, had been fixed but no men-

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[1] *Dig.* xvii. 2, 7.
[2] *Dig.* xvii. 2, 1 pr.
[3] *Code*, iv. 37, 6.
[4] *Dig.* xvii. 2, 70.
[5] *Code*, iii. 37, 5.
[6] *Cf. Dig.* xvii. 2, 57; also French Civil Code, Art. 1833.
[7] *Cf.* French Civil Code, Art. 1833.
[8] *Cf.* Gaius, *Inst.* iii. 149; Justinian, *Inst.* iii. 25, 2.
[9] *Cf. Dig.* xvii. 2, 5, 1.
[10] Justinian, *Inst.* iii. 25, 1; Gaius, *Inst.* iii. 150.

tion was made of the other, its amount was considered to the same as that other which had been agreed upon.[1]

A contract of partnership was valid in which one of the parties was to share in the profits but was not to be liable for any share of the losses;[2] the converse case, however, was invalid in which it was agreed that one of the parties was to share in the losses but not in the profits;[3] such an arrangement was styled by the jurists *societas leonina*, and it was not considered as a proper partnership; it was void on that account, because it was of the essence of true partnership that there should be a consideration in the form of profit present to the minds of each of the parties and arising from either the money or the services contributed by each; such an arrangement would amount to a form of donation rather than a partnership.[4]

SECTION 140.—RIGHTS AND DUTIES OF PARTNERS[5]

In the Roman contract of partnership the rights and duties of partners amongst themselves (*inter se*) were alone considered, and the rights and obligations of third parties in relation to the partners or the partnership were not dealt with. The reason of this is that the Roman Law, contrary to modern principle, did not regard each partner as an implied agent for the other partners whom he might effectually bind in transactions with third persons within the scope of the partnership business. The absence of the implication of agency on the part of each partner was due to the slow development of the law of agency in the Roman Law in connection with the making of contracts. The Roman Law in theory did not permit one independent person to represent another in the making of a contract, or in the performance of other legal acts regulated by the *jus civile*;[6] the only legal contracting party was that person who actually made the contract, speaking the binding words and performing the essential formalities, and only that person could sue and be sued on the contract.[7] According to Roman Law a

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[1] Justinian, *Inst.* iii. 25, 3; Gaius, *Inst.* iii. 150.

[2] Justinian, *Inst.* iii. 25, 2.

[3] *Dig.* xvii. 2, 29, 2. *Cf.* French Civil Code, Art. 1855.

[4] Cf. *Dig.* xvii. 2, 5, 2.

[5] *Cf.* French Civil Code, Arts. 1843-1861.

[6] This did not apply to the case of a slave, or of a person under *potestas* binding his master (*dominus*) or his *paterfamilias*, as the case might be.

[7] The failure of the Roman Law to recognise direct representation in the making of contracts or in the performance of legal acts gave rise to the contract of "Mandate" (*mandatum*), by means of which a person in whom special confidence was placed contracted in his own name (although really on behalf of another person) but subject to an express undertaking to give up to the person on whose behalf the

partnership was not a juristic person having a legal existence apart from that of the partners composing it; as a result contracts made by individual partners in the course of the partnership business and on behalf of the partnership, gave rise to obligations only between the individual partner making them and third parties, and did not create enforceable contractual obligations between the partnership as such and third persons. Only the particular partner who had made the contract could competently be sued for its enforcement;[1] but he had a right of recourse thereafter against the other partners, by means of the *actio pro socio*, as the ordinary remedy by which the mutual rights and duties of partners were enforced amongst themselves.

A contract that had been made by a partner in that capacity, but which went beyond the proper scope of the partnership business, and one entered into by a partner as an individual and not as a partner, and which was on his own private account and for his own benefit, created no enforceable rights as against the other partners, and the sole responsibility was upon the contracting partner.

Each partner was bound to contribute to the partnership funds the amount of capital agreed upon, in the agreed proportions, whether in money, or in services, or in both. It was, further, the duty of each partner to account to the other partners for all sums or profits obtained by himself in the course of carrying on the partnership business, and to contribute to the partnership funds all acquisitions gained by himself in the exercise of his labour and skill that might properly come within the definition of commercial or business profit (*quaestus*).[2]

But a partner was not bound to account for or to contribute to the partnership anything that had been acquired by him in such ways as by succession or by testament or by gift; for such things accrue to him personally and not in the capacity of a partner, and are outside of and have no relation to the ordinary business of the partnership.

The liability of a partner in a trade or professional partnership to contribute to the partnership debts was limited to such debts only as had been properly incurred within the limits of the partnership business, in the absence of any express agreement otherwise.

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contract was entered into, anything gained by the transaction. This was an indirect mode of representation; the person contracting in his own name was personally bound by the contract, but the contract of mandate imposed upon the *mandator*, or person on whose behalf the act was done, an obligation to make good to the *mandatarius*, or person doing the act, any loss that he might thereby incur. See "Mandate," *post*, p. 401, and specially the "History of Mandate," p. 402.

[1] The Praetorian law, however, permitted the third party to sue the partners if they had benefited by the contract (*Dig.* xvii. 2, 82), and the other partners to sue if they could not protect their interests by any other means (*Dig.* xiv. 3, 1, 2).

[2] See *ante*, p. 395, note 1.

Each partner was entitled to be reimbursed out of the funds of the partnership all expenses that he had properly incurred in the course of carrying on the partnership business, and he was also entitled to be relieved of all obligations properly incurred by him on behalf of the partnership. A partner was bound to exercise ordinary diligence in the business of the partnership, or the same care as he ordinarily showed in the management of his own affairs, and he was liable within these limits for loss occasioned to the partnership by his negligence.[1] A partner was not liable for loss occasioned by inevitable accident (*damnum fatale*), or by superior force (*vis major*).[2]

SECTION 141.—TERMINATION OF PARTNERSHIP[3]

The contract of partnership (*societas*) might be ended or dissolved in a considerable variety of ways and circumstances; thus it might terminate by (*a*) mutual consent of the partners;[4] (*b*) expiry of the period for which the partnership had been entered into;[5] a partner withdrawing before the expiry of the period that had been agreed upon for the continuance of the contract thereby lost all all rights as a partner, but at the same time remained liable for all partnership obligations during the time;[6] (*c*) renunciation or withdrawal of a partner, if no time had been fixed for the duration of the contract.[7] A partner might renounce or withdraw at any time, and an agreement to the effect that he should not be entitled to withdraw was invalid;[8] but when a time had been definitely fixed for the duration of the contract a partner could not escape liability as such during the agreed upon period.[9] Even although the continuance of the partnership was indefinite a partner was not entitled to renounce or withdraw at a time specially inconvenient to the other partner, or in bad faith (*in mala fide*) in order to obtain for himself some personal advantage,[10] as, for example, if a partner in a partnership embracing all the property of each of the partners (*societas omnium*, or *totorum bonorum*) were to withdraw in order to enjoy alone the benefit of an inheritance or a legacy that had been left to him; in such a case he would be bound to

[1] Justinian, *Inst.* iii. 25, 9; *Dig.* xvii. 2, 72. Cf. *Dig.* xiii. 6, 5, 2.
[2] *Dig.* xvii. 2, 53, 3; xvii. 2, 58 pr., 1.
[3] *Cf.* Justinian, *Inst.* iii. 25, 4-8; Gaius, *Inst.* iii. 151-154; *Dig.* xvii. 2, 65.
[4] Justinian, *Inst.* iii. 25, 4.
[5] *Dig.* xvii. 2, 65, 6.
[6] *Dig.* xvii. 2, 65, 6.
[7] Justinian, *Inst.* iii. 25, 4.
[8] *Dig.* xvii. 2, 14.
[9] See *supra*.
[10] Justinian, *Inst.*, *ut supra*.

put the benefit so accruing to him into the common fund and share it with the other partners in terms of the contract;[1] but if a partner withdrew in good faith any such subsequent benefit would accrue to him alone, and the remaining partner or partners would alone enjoy any partnership profits acquired subsequent to the renunciation;[2] (*d*) fulfilment of the object of the partnership, as where a partnership had been formed for a particular transaction;[3] (*e*) happening of an event that rendered impossible the accomplishment of the object of the partnership; (*f*) loss of the partnership property or funds;[4] (*g*) death of a partner, unless the partnership contract expressly provided otherwise.[5] The death of one partner dissolved the partnership although there might be more than one partner surviving unless it had been specially agreed otherwise at the time when the contract was formed;[6] the contract, however, was not dissolved, but was considered as still existing in the case where a partner had acted as such, in good faith, on the assumption that his partner was alive when he was in fact dead at the time;[7] (*h*) insolvency or bankruptcy of a partner, involving either *cessio bonorum* or *venditio bonorum;* but in both such cases the partners might agree to form a new partnership;[8] (*i*) *capitis deminutio maxima* or *media* of a partner and the consequent confiscation (*publicatio*) of his property[9] by the "fisc" or public treasury. The effect of confiscation was to destroy the legal *persona* of the partner, who was thereby civilly dead as such. The *capitis deminutio minima* of a partner had not the effect of dissolving a partnership, so that neither the arrogation[10] nor the emancipation[11] of a partner terminated the contract;[12] but the arrogator did not, as such, become a partner, as no one could become such without the consent (*invitus*) of the other partners;[13] (*j*) an action

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[1] *Inst.*, *ut supra.*

[2] *Inst.*, *ut supra.*

[3] Justinian, iii. 25, 6; *Dig.* xvii. 2, 65, 10.

[4] *Dig.* xvii. 2, 63, 10.

[5] *Inst.* iii. 25, 5; *Dig.* xvii. 2, 65, 9; Gaius, *Inst.* iii. 152. The *Societas vectigalis* (see *ante*, p. 395) was an exception to this rule, and the heir of such a partner might by special agreement succeed him (*Dig.* xvii. 2, 59; xvii. 2, 35).

Inst., *ut supra; Dig. ut supra.*

[7] *Dig.* xvii. 2, 65, 10. This equitable principle was also applied in the contract of "Mandate." See *Dig.*, *ut supra;* and also *post*, p. 409.

[8] Justinian, *Inst.* iii. 25, 8; Gaius, *Inst.* iii. 154.

[9] *Inst.* iii. 25, 7; *Dig.* xvii. 2, 65, 12. See on *capitis deminutio*, Part II., Sections 3-7, pp. 72-77.

[10] See on "Arrogation," *ante*, Part II., Section 33, p. 132.

[11] See on "Emancipation," *ante*, Part II., Section 32, p. 130.

[12] *Dig.* xvii. 2, 65, 11; xvii. 2, 58, 2.

[13] Cf. *Dig.* xvii. 2, 65, 11.

at law. If one partner brought an action against any of his partners in order to enforce his rights under the partnership contract, the latter was considered as thereby *ipso facto* dissolved.[1] The action known as *pro socio* was the legal remedy that was usually employed in the case of disputes between partners, as for the settlement of accounts or for compensation for loss incurred in the course of transacting partnership business, and generally, for the enforcement of the rights *in personam* of the partners. But a partner who had committed a delict against any of his partners was liable, according to circumstances, to such actions as the *actio furti, actio vi bonorum raptorum*, and the *actio legis Aquiliae*;[2] and there was yet another action to which partners might be liable, known as the *actio communi dividundo*, when it was sought to obtain a division of common property.

SECTION 142.—THE CONTRACT OF MANDATE (MANDATUM)[3]

This was, in Roman Law, a contract by which one person agreed to do something, or to give some personal services, without remuneration, on behalf of another person, who, on his part, undertook to protect him from loss in respect of so doing.

> It will be observed from the definition that the contracts of "mandate" and "commodate" are closely related to each other, for while *mandatum* was a contract to give personal service without a consideration, *commodatum* was a contract for the use of a thing without a consideration;[4] for these reasons these two contracts stand in the same relation to the contract of hire, or *locatio-conductio*, which was a contract for either the use of a thing, or for personal services for a monetary consideration.[5]

The person for whom the service was done or given was styled the *mandator* or "mandant," and the person doing the act or giving the service on the other's behalf was known as the *mandatarius* or "mandatary."

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[1] *Dig.* xvii. 2, 65.

[2] *Dig.* xvii. 2, 45; xvii. 2, 46; xvii. 2, 47, 1; xvii. 2, 49; xvii. 2, 50; xvii. 2, 51 pr.; xvii. 2, 51, 1.

[3] See Justinian, *Inst.* iii. 26; *Dig.* xvii. 1; *Code*, iv. 35. See also, on the "Contract of Mandate" generally, Hunter, *Roman Law*, 4th ed., 482-490, and 533, 534; Mackenzie, *Roman Law*, 7th ed., 253-256; Moyle, *Institutes of Justinian*, 4th ed., 447-453; Sandars, *Institutes of Justinian*, 8th ed., 377-385; Buckland, *Roman Private Law*, 281-285; Sohm, *Institutes of Roman Law*, 3rd ed., 407, 408; Cuq, *Institutions Juridiques des Romains*, ii. 432-437; Girard, *Manuel de Droit Romain*, 5th ed., 581-587; May, *Éléments de Droit Romain*, 8th ed., 310-313. *Cf.* French Civil Code, Arts. 1984-2010.

[4] See on "Commodate," *ante*, p. 338.

[5] See on "Hire," *ante*, p. 382. *Cf.* Hunter, *Roman Law*, 4th ed., 534.

The contract of *mandatum* was the Roman equivalent of the modern law of agency.

History of Mandate.—The principle of representation in the making of contracts developed very slowly in the Roman Law, the fundamental theory of which was that one person could not represent another and that the only lawful contracting party was he who actually made the contract, who spoke the binding words, and who performed the essential formal acts. That person alone could sue and be sued, and it was immaterial that the contract was really made on behalf of some one else.

The expedient was resorted to of obtaining a friend in whom reliance could be placed to contract in his own name, subject to an undertaking to give up to the person at whose request he entered into the contract anything that he might gain under it, whilst the person on whose behalf the contract had been made undertook to hold his friend free from any loss or liability. In the earlier period of Roman Law the promise to perform the act of friendship was accompanied by certain formalities; the person on whose behalf the act was being done took the hand of the other in his right hand, telling him at the same time that he thereby placed in his hand the commission that he desired to have executed. For this reason the trust itself was called *mandatum* or *manu datum*, that is, "given with the hand." The contract of a *mandatum* was thus in its origin the execution of an office of friendship, and on that account it was gratuitous in character,[1] while a specially high degree of care was required in the performance of the trust as an equivalent to the excessive confidence reposed in the mandatary;[2] wilful failure to properly execute the trust, involving condemnation in an *actio mandati*, stamped the person with "infamy" (*infamia*).[3]

With the development of the Praetorian law, and the means which it provided for the enforcement of all claims based upon principles of equity, friends who entered into a contract of mandate were compelled to perform their reciprocal duties. The Praetor enabled the *mandator* to compel the *mandatarius* to account for, and to give up, all profits received by him by means of the direct action of mandate (*actio mandati directa*), and the mandatary might similarly compel the mandant to make good to him any expenses or losses incurred by him, and to free him from any liabilities incurred by him in the course of the execution of the mandate, by means of the "contrary" action of mandate (*actio mandati contraria*).

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[1] Cf. *Dig.* xvii. 1, 1, 4.

[2] *Code*, iv. 35, 13.

[3] *Dig.* iii. 2, 1. See p. 410. See upon "*Infamia*," *ante*, Part II., Section 8, p. 77.

The later Praetorian law permitted a *mandator* to bring equitable actions against and to be sued by the third person with whom his mandatary had contracted; and thus whatever "direct" actions the mandatary could have brought, or was liable to, the *mandator* might sue in the form of *actiones utiles.*

> The intervention of an agent was gradually recognised by the Praetorian law; thus, "A *cognitor*, *i.e.* a person authorised formally to conduct a suit, was allowed to act on behalf of the plaintiff or defendant, and fully represented his principal.[1] The manager of a shop (*institor*) and the captain of a ship (*magister navis*) were permitted to bind their employers,[2] and by an extension of the actions appropriate to these cases—*i.e.* by allowing a *utilis actio quasi institoria*—the Praetor made all employers liable for acts of their agents authorised by or profitable to them, and allowed actions to be brought directly against the employer without regard to the procurator or agent; and this was the mode in which the mandator was made responsible. The Praetor also gave the *mandator* the right to sue directly without the consent of the agent, a right not given by the *actionas institoriae* and *exercitariae*, except in special cases. Thus, ultimately, obligations were acquired by or against the *mandator* through the agent, and not for him by the agent."[3]

The contract of mandate in order to be valid required to be lawful, and the act sought to be performed must not be *contra bonos mores;* thus a mandate to commit a theft or to do an injury would not be binding upon the mandatary, nor would the mandatary have any recourse against the *mandator* if he executed such a mandate.[4] Although classed as a "consensual" contract mandate was not properly such,[5] for a feature of the consensual contracts is the presence of the element of a consideration, while mandate was in its essence, and by reason of its origin,[6] gratuitous in character.[7] The introduction of a consideration would transform the contract into one of hire (*locatio-conductio*), either of work or of services, as the case might be;[8] but a sum of money might be agreed upon as an *honorarium* or reward for the services rendered that did not fall within the terms of contract and in no way affected its essentially gratuitous character.

> The gratuitous nature of the contract of mandate was gradually felt as an inconvenience, and it came to be competent for parties to

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[1] See Justinian, *Inst.* iv. 10 pr.; Sandars, *Institutes of Justinian*, 8th ed., 469, note.

[2] Justinian, *Inst.* iv. 7, 2.

[3] Sandars, *Institutes of Justinian*, 8th ed., 379.

[4] *Cf.* Justinian, *Inst.* iii. 26, 7; Gaius, *Inst.* iii. 157; *Dig.* xvii. 1, 22, 6.

[5] Hunter, *Roman Law*, 4th ed., 533.

[6] Cf. *Dig.* xvii. 1, 1, 4.

[7] *Cf.* French Civil Code, Art. 1986.

[8] Justinian, *Inst.* iii. 26, 13; *Dig.*, *ut supra.* *Cf.* Gaius, *Inst.* iii. 162.

agree upon what was called *honorarium* (or *salarium*),[1] not by way of payment for the services but in gratitude for them; but an agreement as to *honorarium* formed no part of the contract of mandate itself and could not, originally, be enforced by action; when, later on, "salaries" (*salaria*), or *honoraria* to those persons who exercised the liberal professions came to be recoverable, this was only possible by a special action quite distinct from remedies appropriate to the contract of mandate.

The consent of parties to the contract of mandate might be given in any way that sufficiently clearly indicated their intention. It might be either express or implied. If express, the agreement might be either verbal or in writing, and if implied it might be inferred from facts and circumstances, as, for example, if a man permitted another to do his business for him.

The contract of mandate may truly be said to stand midway between the "real" and the "consensual" contracts. It was purely consensual in respect that the mode in which the consent of parties was expressed was immaterial to the validity of the contract, but it is distinguished from the other so-called "consensual" contracts, and approximates to the "real" contracts in respect that the contract was not complete to the effect of being binding and reciprocally enforceable by the mere fact of consent; for no enforceable obligation was created until the mandatary had actually commenced performance of the commission entrusted to him, or matters were no longer entire and had gone so far that the "mandant" (*mandator*) had not a reasonable opportunity either to act himself or to appoint some one else to act for him if the mandatary should refuse to act; up to that point the mandatary was entitled to renounce his mandate without thereby subjecting himself to liability.[2]

A mandate may be either (*a*) general, or (*b*) special.[3]

A "general" mandate is one in respect of which one man represents another in all his affairs; while a "special" mandate is one in respect of which one man acts for another with regard to one or more particular things or undertakings.[4] Besides being either "general" or "special," *mandatum* might also be *simplex* or *qualificatum* according as the agency was undertaken for the benefit of the principal or for that of a third person.

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[1] These terms were specially applied to the rewards given to persons exercising what were known as the liberal professions, such as advocates, rhetoricians, philosophers, or physicians.

[2] See Justinian, *Inst.* iii. 26, 11; *Dig.* xvii. 1, 22, 11.

[3] *Cf.* French Civil Code, Arts. 1987, 1988.

[4] Cf. *Dig.* iii. 3, 1.

The contract of mandate might be constituted either (*a*) to take effect from a particular time (i.e. *in diem*) or (*b*) subject to a condition (i.e. *sub conditione*).[1]

The Roman contract of *mandatum* was employed for three special purposes, namely (1) to effect agency or representation ;[2] (2) to create suretyship, in the form of *mandatum qualificatum*,[3] as when, for example, one person requested another to lend money to a third person ;[4] in such a case the law implied a promise on the part of the first person to indemnify the second person against any loss incurred through executing the mandate; (3) to transfer (under the later law) the benefit of a debt or other obligation, the assignee, in such a case, being given a mandate to sue in the assignor's name.

There were in the Justinianian law five varieties of the contract of mandate[5] according as it was for the benefit of (1) the *mandator* only ;[6] (2) the *mandator* and the mandatary ;[7] (3) a third party alone ;[8] (4) the *mandator* and a third person ;[9] (5) the mandatary and a third person.[10]

A mandate would be for the benefit of the mandator only if, for example, one person were to give to another a mandate to manage his business, or to buy a property, or to become surety for him ;[11] it would be for the benefit of the *mandator* and the mandatary if a person were to give to another a mandate to lend money to a third person for the good of the mandator's property, or if, when one person was about to sue another as surety, the latter were to give to the former a mandate to sue the principal at his risk, or to stipulate at his risk for payment of something owed by him to the former with a person appointed by him as his substitute ;[12] a mandate would be for the benefit of a third party alone, if, for instance, a mandator were to direct another person to manage the affairs of a third party, or to buy an estate, or to become surety for that person ;[13] a mandate would be for the benefit of the mandator and a third person, if, for example, one person were to give to another an authority to act in matters common to himself and a third party, or to become surety for himself and that third person.[14] A

[1] Justinian, *Inst.* iii. 26, 12 ; *Dig.* xvii. 1, 1, 3.

[2] See *ante*, p. 402, for the history of mandate and how the Roman Law came to recognise that one person might represent another.

[3] See *supra* ; also Moyle, 449.

[4] *Cf.* Justinian, *Inst.* iii. 26, 3 ; *Dig.* xvii. 1, 2, 2.

[5] See on these five varieties and their authority, Moyle, *ut supra*, 447.

[6] Justinian, *Inst.* iii. 26, 1 ; *Dig.* xvii. 1, 2, 1.

[7] Justinian, *Inst.* iv. 26, 2 ; *Dig.* xvii. 1, 2, 4 ; xvii. 1, 45, 7, 8.

[8] Justinian, *Inst.* iii. 26, 3 ; *Dig.* xvii. 1, 2, 2.

[9] Justinian, *Inst.* iii. 26, 4 ; *Dig.* xvii. 1, 2, 3.

[10] Justinian, *Inst.* iii. 26, 5 ; *Dig.* xvii. 1, 2, 5.

[11] Justinian, *Inst.* iii. 26, 1 ; *Dig.* xvii. 1, 2, 1.

[12] Justinian, *Inst.* iii. 26, 2 ; *Dig.* xvii. 1, 2, 4 ; xvii. 1, 45, 7, 8.

[13] Justinian, *Inst.* iii. 26, 3 ; *Dig.* xvii. 1, 2, 2.

[14] Justinian, *Inst.* iii. 26, 4 ; *Dig.* xvii. 1, 2, 3.

mandate would be for the benefit of the mandatary and a third person if a mandator were to direct a mandatary to lend money to a third party at interest.[1]

There could not be a valid contract of mandate for the benefit of the mandatary alone; as when, for example, one man advises another to invest his money in a certain way; such advice is not a mandate and is not obligatory as such.[2]

Section 143.—Duties of Parties in Contract of Mandate

(1) *Duties of the Mandatary*[3]

The mandatary, in the first instance, was not bound to undertake the contract,[4] but, having undertaken it, he was bound to fulfil it unless certain good reasons recognised by the law, such as sudden and serious illness, a necessary journey, enmity arising between the *mandator* and the *mandatarius*, or the insolvency of the *mandator*,[5] entitled him to renounce it.[6]

The reason why the insolvency of the *mandator* was considered as a good ground for renunciation of the mandate was that the mandatary thereby lost his guarantee against loss incurred in the execution of the mandate, which was one of the essential features of the contract.

A mandate might be renounced, just as it might be revoked, so long as nothing had been done to carry it out; or, in legal phraseology, so long as "matters were still entire."[7] But neither *mandator* nor *mandatarius* was entitled to revoke or to renounce the mandate, as the case might be, in such a way, or at such a time, as to prejudice the interests of the other. If the mandatary renounced the mandate he was bound to do so without delay in order that the mandant might have an opportunity either to do the work himself or to get some other person to undertake the duty.[8] It was this power of revocation which distinguished the contract of mandate from the other consensual con-

[1] Justinian, *Inst.* iii. 26, 5; *Dig.* xvii. 1, 2, 5. If the money was lent without interest the mandate would be for the benefit for the third person only (*Inst., ut supra*).

[2] Justinian, *Inst.* iii. 26, 6; Gaius, *Inst.* iii. 156; *Dig.* xvii. 1, 2, 6. See also Sandars, *Institutes of Justinian*, 8th ed., 381, note.

[3] *Cf.* French Civil Code, Arts. 1991-1997.

[4] Justinian, *Inst.* iii. 26, 11; *Dig.* xvii. 1, 22, 11.

[5] Paul, *Sent.* ii. 15, 1. Cf. *Dig.* xvii. 1, 23-25.

[6] Justinian, *Inst., ut supra; Dig., ut supra.*

[7] *Res integra.*

[8] Justinian, *Inst.* iii. 26, 11.

tracts, and gave it the peculiar character of being at once complete, and yet, at the same time, of being uncertain of taking effect.

The mandatary was bound to perform the duties of the contract with reasonable speed, and if he delayed unduly he was liable to the mandant in an action (*actio mandati*);[1] what amounted to undue delay (*mora*) was a question of circumstances in each case. The mandatary was bound to execute the mandate according to its terms and within its limits;[2] if he exceeded his instructions, express or implied, he was liable to an action at the instance of his principal for breach, while he himself would have no remedy or claim against his principal for indemnity if the excess of his instructions had involved him in loss.[3] So long, however, as the mandatary acted within the limits of his instructions and the terms of his mandate, the *mandator*, or principal, was bound to ratify what he had done, and to reimburse him for all expenses he had properly incurred, and to relieve him of all obligations he had properly undertaken.[4]

A mandatary was also bound to perform his mandate honestly and with the utmost care; it was his duty to show the diligence of a "good *paterfamilias*,"[5] and he was therefore liable for *culpa levis* as well as for *dolus* and for gross negligence.[6]

This liability of the mandatary for *culpa levis* and the obligation upon him to show the utmost care is an exception to the general rule of the Roman Law that those who derive no benefit from a transaction are only liable for *culpa lata*, or gross negligence.[7] This liability was probably based upon the origin of the contract of mandate, as, primarily, the discharge of an office of friendship,[8] and had in view the protection of the *mandator* against any abuse by the *mandatarius* of the trust reposed in him.[9]

The jurist Modestinus, indeed, states[10] that the *mandatarius* was only answerable for *dolus* and not for *culpa*, and in that respect contrasts him with a *tutor* who was responsible for both. "The statement of Modestinus

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[1] Justinian, *Inst.* iii. 26, 11.

[2] Justinian, *Inst.* iii. 26, 8. *Cf.* French Civil Code, Art. 1989.

[3] Justinian, *Inst.*, *ut supra*; Gaius, *Inst.* iii. 161; *Dig.* xvii. 1, 3, 2-4, 5; xvii. 1, 41. See, for examples of the proper execution or non-execution of the duties of a mandatary, Hunter, 486, 487.

[4] *Dig.* xvii. 1, 10, 9, 10; xvii. 1, 12, 9; xvii. 1, 27, 4; xvii. 1, 56, 4. *Cf.* French Civil Code, Arts. 1998-2000.

[5] *Code*, iv. 35, 13.

[6] See *ante*, Section 112, p. 331. *Cf.* French Civil Code, Art. 1992.

[7] See *ante*, p. 331.

[8] Cf. *Dig.* xvii. 1, 1, 4. See also *ante*, p. 408.

[9] *Cf.* Mackenzie, *Roman Law*, 7th ed., 254, note 2.

[10] *Mos. et Rom. Leg. Collat.*, x. 2, 3.

was undoubtedly not law; it is interesting, however, as evidence that there was not complete unanimity among the Roman jurists upon the subject of the responsibility of the *mandatarius*."[1]

The *mandator*, however, since he was deriving benefit from the transaction, was liable for *omnis culpa*. It was the duty of a mandatary to render to the mandant an account of his actings, and he was bound to give up to the latter all property or produce that had been acquired by him and was in his possession by reason of the execution of the mandate;[2] it was, further, his duty to give up all rights of action acquired by him against third parties;[3] his refusal or failure in these respects rendered him guilty of *dolus*. If, owing to his own fault or misconduct, a mandatary was unable to account, or to render up the property or produce entrusted to him, he was liable to make good to the mandant the loss occasioned by his failure in duty. But a mandatary was not liable for accidental loss unless he had specially undertaken to be so.[4]

(2) *Duties of the Mandant (Mandator)*[5]

The *mandator*, or principal, was the person who gave the mandate. His obligations may be summarised generally as to ensure that the *mandatarius* incurred no loss by reason of the execution of the mandate, on the equitable ground that since he got no profit by the transaction, so ought he to suffer no loss.[6] But this general obligation upon the mandant was conditional upon the mandatary performing his mandate properly. In virtue of this general obligation the *mandator* was bound to ratify whatever had been done by the mandatary within the limits of his instructions, and to make good to him all expenses reasonably and properly incurred by him in the execution of the mandate;[7] he was, moreover, bound to accept whatever the mandatary had bought, and to indemnify or relieve him from all obligations undertaken by him in the due and proper performance of the commission entrusted to him.[8]

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[1] Hunter, *Roman Law*, 4th ed., 487.

[2] *Dig.* xvii. 1, 10, 2; xvii. 1, 10, 9.

[3] *Dig.* xvii. 1, 43.

[4] *Dig.* xvii. 1, 39.

[5] *Cf.* French Civil Code, Arts. 1998-2002.

[6] See, as to loss suffered by a mandatary, *Dig.* xvii. 1, 15; xvii. 1, 20 pr.; xvii. 1, 20, 6-7; xlvii. 2, 61, 5.

[7] *Dig.* xvii. 1, 10, 9, 10; xvii. 1, 12, 9; xvii. 1, 27, 4; xvii. 1, 56, 4. Expenses of a mandatary included personal expenses, as for travelling (so far as these were not merely luxurious and unreasonable), and also money expended upon obtaining fruits or produce.

[8] See *ante*, p. 407. *Cf.* also French Civil Code, Arts. 1998-2000.

SECTION 144.—TERMINATION OF THE CONTRACT OF MANDATE[1]

The contract of mandate might be ended by (*a*) mutual consent; (*b*) completion of the work undertaken; (*c*) revocation on the part of the *mandator*;[2] (*d*) renunciation on the part of the mandatary;[3] (*e*) death of either party;[4] (*f*) impossibility of executing the mandate.

When the mandate had been revoked before it had been acted upon in any way no obligation arose under the contract, which was ended *ipso facto* by the revocation; if, however, the mandate had been partially fulfilled the *mandator* was liable to the *mandatarius* to the extent of what had been duly and properly done towards the performance of the mandate, on the principle that it would be inequitable to permit a *mandator*, by merely revoking the mandate, to escape liability to the mandatary for what the latter had already in good faith and properly, although only partially, performed in pursuance of his mandate.[5]

The mandatary was only entitled to renounce the mandate while matters were still entire and in such circumstances that the mandant would not be prejudiced by the renunciation,[6] or for certain reasons regarded by the law as good and sufficient to justify the act, such as sudden illness, a necessary journey, enmity emerging between the parties, or the insolvency of the *mandator*.[7] Although the death of either the mandant or the mandatary ended a contract *ipso facto*, yet if a mandatary who was excusably ignorant of the death of his principal did something in good faith and within the terms of his mandate, he was entitled to be indemnified by the heirs of the *mandator*, and could bring an action against them if they resisted his claim.[8] Impossibility of performing the contract might be occasioned by either physical or legal causes.[9]

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[1] *Cf.* French Civil Code, Arts. 2003-2010.

[2] Justinian, *Inst.* iii. 26, 9; Gaius, *Inst.* iii. 159.

[3] Justinian, *Inst.* iii. 26, 11; *Dig.* xvii. 1, 22, 11.

[4] Justinian, *Inst.* iii. 26, 10; Gaius, *Inst.* iii. 160; *Dig.* xvii. 1, 26 pr.

[5] Cf. *Dig.* xvii. 1, 15.

[6] Justinian, *Inst.* iii. 26, 11; *Dig.* xvii. 1, 22, 11. *Cf.* French Civil Code, Art. 2007.

[7] Paul, *Sent.* ii. 15, 1; see also *ante*, p. 406. *Cf.* French Civil Code, Art. 2003.

[8] *Cf.* Justinian, *Inst.* iii. 26, 10; Gaius, *Inst.* iii. 160; *Dig.* xvii. 1, 26 pr. *Cf.* French Civil Code, Art. 2008. On the same principle, if a slave had acted as the steward of his master, and debtors made payments to him as such in ignorance of the fact that he had been manumitted, or had ceased to act as steward, or had been sold, they were thereby freed from their obligation (Justinian, *Inst.*, *ut supra*; *Dig.* xlvi. 3, 51).

[9] See, on "Impossibility of Performance of Obligations," *ante*, p. 314.

SECTION 145.—REMEDIES OF PARTIES IN CONTRACT OF MANDATE

The *mandator* or principal could sue the *mandatarius* in the *actio mandati directa*, and the mandatary could sue the mandant in the *actio mandati contraria*. If an *honorarium* had been agreed upon as a reward for the services given it could not be recovered under the *actio mandati*, but only by special and separate procedure *extra ordinem*. The condemnation of the mandatary in an action at the instance of the *mandator* involved "infamy" (*infamia* [1]), if his failure to perform his obligation had been wilful: [2] the reason for this is to be found in the special fiduciary origin of the contract of mandate.[3]

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[1] See, on "*Infamia*," *ante*, Part II., Section 8, p. 77.

[2] *Dig.* iii. 2, 1. Cf. *ante*, p. 402.

[3] See *ante*, p. 402, for the origin of the contract.

CHAPTER X

Obligations arising Quasi ex Contractu—Quasi-contracts [1]

Certain obligations are held to arise, and to be implied, from circumstances alone, "as if" (*quasi*) they were the outcome of express agreement. Such obligations thus arising *quasi ex contractu*, as the Roman jurists said, are known as "quasi-contracts," because they are analogous in their incidents to those arising *ex contractu* or from express consent.

A "quasi-contract" may be defined, accordingly, as one analogous to an express contract, by which one person is put under a legal obligation to another person, or another person is bound to him by implication from circumstances alone, upon grounds of equity or of public policy, without the necessity of any express agreement or consent on the part of one person or another.

"Rights *in personam* arising from consent are contracts; rights *in personam* arising by operation of law are quasi-contracts." [2]

Examples of quasi-contractual obligations in the Roman Law are *Negotiorum gestio*,[3] *Solutio indebiti*,[4] *Lex Rhodia de jactu*;[5] the obligation known as *Receptum nautarum cauponum stabulariorum*, or that placed upon "shipmasters, innkeepers, and stablers" by the Praetorian Edict known as *Nautae Caupones*;[6] and the obligations created by the relation of tutor and pupil,[7] curator and ward, heir and legatee,[8] common owners [9] and co-heirs.[10]

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[1] See also Chapter III., *ante*, p. 301. And see Justinian, *Inst.* iii. 27; Hunter, *Roman Law*, 4th ed., 655-666; Moyle, *Institutes of Justinian*, 4th ed., 390, 454-457; Sandars, *Institutes of Justinian*, 8th ed., 385-389; Mackenzie, *Roman Law*, 7th ed., 262-267; Buckland, *Principles of Roman Private Law*, 302-307; May, *Éléments de Droit Romain*, 8th ed., 375-383; Sohm, *Institutes of Roman Law*, 3rd ed., 408-414. *Cf.* also French Civil Code, Arts. 1370-1386.

[2] Hunter, *ut supra*, 655.

[3] Justinian, *Inst.* iii. 27, 1; *Dig.* iii. 5, 2; xliv. 7, 5 pr.; *Code*, ii. 18, 20.

[4] Justinian, *Inst.* iii. 27, 6; *Dig.* xliv. 7, 5, 3.

[5] *Dig.* xiv. 2.

[6] *Dig.* iv. 9. This obligation is not mentioned by Justinian in the *Institutes* as an example of quasi-contract.

[7] Justinian, *Inst.* iii. 27, 2; *Dig.* xliv. 7, 5, 1.

[8] Justinian, *Inst.* iii. 27, 5; *Dig.* xliv. 7, 5, 2.

[9] Justinian, *Inst.* iii. 27, 3; *Dig.* xvii. 2, 31, 34.

[10] Justinian, *Inst.* iii. 27, 4; *Dig.* xvii. 2, 34.

The quasi-contractual relation created by *negotiorum gestio* was analogous to that arising in the contract of mandate (*mandatum*),[1] as was also the case of the relations between tutors and pupils, curators and wards, and heirs and legatees. The relations created by *solutio indebiti* were analogous to those of *mutuum*;[2] those created by *receptum nautarum*[3] resembled *depositum*,[4] while those existing between owners-in-common and co-heirs were analogous to *societas*.[5]

SECTION 146.—NEGOTIORUM GESTIO[6]

This was the name applied to the spontaneous and unauthorised assumption by one person of the affairs of another person without any previous mandate or authority from him. A *negotiorum gestor*, or, literally, "a manager of affairs," was thus a person who had, unasked, done something for another (as, for example, conduct a lawsuit for a man who is absent, take charge of a man's property, or pay a man's debts), and such an act created reciprocal obligations between the parties very similar to those arising from the contract of mandate.[7] This particular form of obligation was first recognised by and received its sanction from the Praetorian Edict, which introduced the *actio negotiorum gestorum* for the enforcement of the reciprocal duties of parties created in such circumstances.[8]

SECTION 147.—ESSENTIALS OF NEGOTIORUM GESTIO

In order to constitute the quasi-contractual relationship of *negotiorum gestio* it was requisite that there should be (*a*) an overt act on the part of one person for the benefit of the other; (*b*) no mandate to do, or prohibition against doing the act; (*c*) an intention to benefit and to bind the person for whom the act is done.

(a) *An Overt Act.*—The act of the *gestor* must have been overt or open, and capable of being seen, such as the repair of a wall, or of a house, to prevent its destruction or deterioration, or the payment of a person's debts to a third party in order to avert the seizure of his

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[1] See, on "Mandate," *ante*, p. 401 *et seq.*

[2] See, on "Mutuum," *ante*, p. 334 *et seq.*

[3] See *post*, p. 418.

[4] See, on "Deposit," *ante*, p. 342 *et seq.*

[5] See, on *Societas* or Partnership, *ante*, p. 394 *et seq.*

[6] See Justinian, *Inst.* iv. 27, 1; *Dig.* iii. 5, 2; *Dig.* xliv. 7, 5 pr.; *Code*, ii. 19. See also Hunter, *Roman Law*, 4th ed., 661-666; Mackenzie, *Roman Law*, 7th ed., 262, 263; Moyle, *Institutes of Justinian*, 4th ed., 454, 455; Sohm, *Institutes of Roman Law*, 3rd ed., 411, 412.

[7] Cf. *Dig.* xliv. 7, 5 pr.

[8] Cf. *Dig.* iii. 5, 3 pr.

property. The act, moreover, must have been for the benefit of the other person; a man who interfered in the affairs of another person for his own benefit was not a *negotiorum gestor*.

(b) *No Mandate.*—It was essential to the idea of *negotiorum gestio*, and in order to create the quasi-contractual relationship involved in it, that the person acting for the benefit of the other should have no mandate or authority from him to do so, because the reason for the recognition of *negotiorum gestio*, and the introduction of the *actio negotiorum gestorum*, was in order to supplement the express contract of mandate in that respect, so that, in the absence of express agreement, a person might, upon equitable grounds, if the circumstances appeared to demand it, be reimbursed expenditure incurred by him with the object and intention of benefiting another.[1] Moreover, the person doing the act must not only have no authority to do so, but must not have been forbidden by the other person to do the act.[2]

(c) *An Intention to Benefit and to Bind the other Person.*—The justification of the unauthorised act of the *negotiorum gestor* was the desire to preserve the property of the other person, and thereby benefit him; if, however, there was no such intention, and the *gestor* acted as if he himself were the owner of the property, with the object of benefiting himself, he was not a true *gestor* and could not sue the *actio negotiorum gestorum* against the other person, although he would be liable to the same action at the instance of the latter.[3] Further, the person doing the act, in order to acquire the true character of *negotiorum gestor*, must have acted with the intention of thereby binding the other; if he acted with an *animus donandi*, or an intention to make a gift,[4] or merely in the performance of a duty that he already owed,[5] he was not a true *gestor*, and no reciprocal and enforceable obligations were created by the act.

> The analogy, and at the same time the distinction, between *negotiorum gestio* and *mandatum* will now be evident. While mandate was based upon the request of the *mandator*, the *gestor* acted without either the knowledge or the authority of the principal. Moreover, *negotiorum gestio* was wholly for the benefit of the absent principal, while mandate might be for the benefit of persons other than the mandator. Further, *mandatum* was one of the contracts recognised as being created by consent of parties, whereas in the case of *negotiorum gestio* the obligation

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[1] *Cf.* Hunter, *ut sup.*, 665, and see examples, *ibid.*

[2] Cf. *Dig.* xvii. 1, 40.

[3] See, for examples, Hunter, *ut sup.*, 664, 665.

[4] *Dig.* iii. 5, 4. See for examples, *Dig.* iii. 5, 44; *Code*, ii. 19, 1; *Dig.* iii. 5, 27, 1; x. 2, 50.

[5] *Code*, ii. 19, 5.

was not created by consent, but was imposed by law upon equitable grounds.

SECTION 148.—DUTIES OF THE NEGOTIORUM GESTOR

The principal duty of the *negotiorum gestor* was to account to the person for whom he had acted—who was the *dominus negotii* or principal—and that person acquired, in virtue of the relationship created by the act, a right to insist that the *gestor* should show, in general, *omnis diligentia*, or the utmost care in the management of the affairs he had unauthorisedly undertaken, and to enforce the right he could employ the *actio negotiorum gestorum directa*.

In general, the *negotiorum gestor* was bound to show "exact" diligence, and not merely the same degree of care as he usually bestowed upon his own affairs, so that he would be liable if a person who was more careful than himself could, in the circumstances, have acted more profitably for the principal (*dominus negotii*).[1]

The reason for this excessive liability was the fact that the interference of the *gestor* was spontaneous and unauthorised.

But although, in the general case, the *gestor* was required to show the utmost care in performing what he had undertaken, yet his liability varied according as his interference in the other person's affairs was or was not necessary, and it might happen in consequence that, according to circumstances, he was either not responsible even for negligence, or responsible even for accident (*casus*) as well as for *omnis diligentia*.

The *gestor* was bound to show the utmost care (*exacta diligentia*) if he had interfered in the affairs of the other person without there being urgent necessity that he should do so;[2] but a *gestor* who interfered unwillingly, and only because he was compelled to do so by force of circumstances, in order to avert a serious loss from the other person—as, for example, to prevent him being rendered bankrupt[3]—was liable only for *dolus*, and not for either fault (*culpa*) or accident (*casus*).

As a general rule accidental loss did not impose any liability upon the *gestor*,[4] unless his interference had been unnecessary;[5] but he was always liable for accidental loss or injury if he acted in directions or ways which he knew, or ought to have known, were contrary to the principles or the habits of the other person.[6]

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[1] Justinian, *Inst.* iii. 27, 1.
[2] Cf. *Dig.* iii. 5, 37, 1.
[3] *Dig.* iii. 5, 3, 9.
[4] *Code*, ii. 19, 22.
[5] *Dig.* l. 17, 36.
[6] *Dig.* iii. 5, 11.

Having once undertaken the duties the *gestor* was bound to go on with them as if he had a mandate to do so, unless or until relieved by the principal (*dominus negotii*); and even if the principal were to die the *gestor* was bound to complete transactions already begun, although he was not entitled to enter upon any new ones.[1]

SECTION 149.—DUTIES OF THE PRINCIPAL IN NEGOTIORUM GESTIO

The principal (*dominus negotii*) was bound to make good to the *negotiorum gestor* all expenditure properly incurred by him for the other's benefit,[2] and to relieve him from all obligations reasonably dertaken in the course of his management.

SECTION 150.—SOLUTIO INDEBITI

When a person, under an erroneous belief as to fact but not of law, except in certain special cases, had paid money that was not really owing, he might recover what he had paid by means of an action known in Roman Law as *condictio indebiti*.[3]

Solutio indebiti, or, literally, "the payment of money not owing," created a legal relation analogous to (quasi) the contract of *mutuum*, for in such circumstances the law implied an obligation on the part of the person receiving the money to pay it back.

In order, however, to recover by means of the *condictio indebiti* money that had been paid in error, it was essential that the money should not have been due under any form of existing obligation, whether "civil" or "natural";[4] if the money was due on equitable grounds, under an existing "natural" obligation it would have been obviously inequitable to insist upon its restoration, and consequently the *condictio indebiti*, in such circumstances, was incompetent.[5] If, moreover, the person who made the payment knew that the money was not due, he could not thereafter sue for its recovery, for in such a case the law presumed donation or gift.[6] Further, the payment must have

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[1] Cf. *Dig.* iii. 5, 21, 2.

[2] *Dig.* iii. 5, 45 pr. Cf. *Dig.* iii. 5, 10, 1, for an instance of expenditure that was not beneficial, and could not therefore be reclaimed by the *gestor*.

[3] See *Dig.* xii. 6; *Code*, iv. 5; Justinian, *Inst.* iii. 27, 6; *Dig.* xliv. 7, 5, 3. Thus a legacy paid under a will supposed to be genuine, but which in fact was false, could be reclaimed.

[4] See on "Civil Obligations" and "Natural Obligations," *ante*, Part IV., Chapter I., Sections 99 and 100, p. 284.

[5] Cf. *Dig.* xii. 6, 51.

[6] *Dig.* l. 17, 53. See on "Donation," Part III., Chapter VI., p. 242 *et seq.*

been accepted in good faith, under an honest belief that it was due; if the recipient knew that the payment was not due he would be guilty of theft (*furtum*), and would be liable to a *condictio furtiva*.

The error under which the payment was made required to be one of fact but not of law, for every one was assumed to know the law,[1] and ignorance of law was therefore no excuse;[2] thus, for example, there would be an error of fact if an executor were to pay a legacy under a will that was really forged, and there would be an error in law if a person, in ignorance of his legal rights as heir, neglected to claim for himself the "Falcidian fourth"[3] and paid the legatees in full; in the former case the amount paid could be recovered, but not so in the latter.[4]

It was not, indeed, all errors of fact that were sufficient to support a *condictio indebiti;* it was requisite that the mistake should have arisen through excusable ignorance and not by reason of want of reasonable and ordinary carefulness.[5]

There were certain special exceptions in the Roman Law to the rule that ignorance of law was no excuse, in the case of persons who were so situated by nature or by circumstances as to be unlikely to know the law or to have opportunities either to know it or to get advice upon it,[6] such as minors,[7] women,[8] peasants,[9] soldiers on service,[10] and other persons presumably more or less excusably ignorant by reason of their circumstances.[11]

The question whether money that had been paid in error of law could be recovered, gave rise to an acute controversy among jurists, the result of which seems to be that if ignorance of law was under any circumstances admissible, it could only be upon the ground that it was excusable.[12]

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[1] *Code*, i. 18, 12.

[2] This is expressed by the maxim, *Ignorantia juris neminem excusat.* The reason for this rule as given was that while the terms of the law can and ought to be definite and capable of being known, yet even the wisest person cannot know everything (*Dig.* xxii. 6, 2; *cf.* xxii. 6, 9 pr.).

[3] The *Lex Falcidia* (B.C. 40) provided that one-fourth of the net value of the inheritance must be left to the heir.

[4] *Dig.* xxii. 6, 9, 5.

[5] Cf. *Dig.* xxii. 6, 9, 2; xxii. 6, 6; xxii. 6, 3, 1.

[6] *Dig.* xxii. 6, 9, 3.

[7] *Dig.* xxii. 6, 10; xxii. 6, 9 pr.

[8] *Dig.* xxii. 6, 9 pr.; ii. 13, 1, 5.

[9] *Dig.* xxii. 3, 25, 1.

[10] *Dig.* xxii. 6, 9, 1.

[11] See, for examples of exceptions, Hunter, *ut sup.*, 660.

[12] See upon the controversy as to the effect of an error in law, Mackenzie, *Roman Law*, 7th ed., 264, 265.

The French Civil Code[1] permits restitution whether the error is one of fact or in law, and gives the person making the payment a right of repetition against the creditor, or an ultimate right of recourse against the true debtor if the creditor in consequence of the payment has destroyed the voucher of the debt. The Austrian Code adopts the same doctrine as that of France, but the Prussian Code only permits restitution for an error in fact, and the same principle prevails in the law of both Scotland and England.[2]

SECTION 151.—LEX RHODIA DE JACTU[3] (JETTISON)

A quasi-contractual relation was created between the owners of a ship and the owners of property on board the ship by the fact of the "jettisoning" of any part of such property. Cargo is said to have been jettisoned when it has been thrown overboard from a ship in danger of destruction through stress of storm, in order to lighten the vessel and thereby save it and the rest of the cargo on board. The *Lex Rhodia de Jactu* was the maritime law of Rhodes that was adopted by the Romans (being introduced by the Peregrin Praetor) and other commercial nations, and applied by them so far as it was not inconsistent with special legislation.[4]

The principle underlying the *Lex Rhodia* was that those persons who suffered loss through property belonging to them being voluntarily sacrificed at sea for the common benefit of the owners of the vessel and the owners of the property not so jettisoned were entitled to be recompensed on equitable grounds *quasi ex contractu*, and the *Lex Rhodia* regulated the apportionment of the loss between the owners of the ship and the owners of the cargo saved. If the jettison had the effect of saving the ship a quasi-contractual relation was thereby created between the owners of the ship and the owners of the cargo that had not been sacrificed, in respect of which they were bound to share proportionately with the owners of the jettisoned goods the loss sustained by the latter, on the principle that their loss had been incurred

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[1] Art. 1377.

[2] *Wilson* v. *Sinclair*, 7th December 1830, 4 Wilson & Shaw's Appeal Cases, 398; *Dixon* v. *Monkland Canal Co.*, 17th September 1831, 5 Wilson & Shaw's Appeal Cases, 445. But cf. *Dickson* v. *Hulbert*, 17th February 1854, 16 D. 586, and *Mercer* v. *Anstruther*, 6th March 1871, 9 Macph. 618; 25th April 1872, 10 Macph. (H. L.) 39, for evidence that the Scottish Courts have hesitated to accept the *dicta* of the House of Lords in the cases of *Wilson* and of *Dixon* to the effect that a mistake in law can never afford ground for the *condictio indebiti*. See Mackenzie, *ut sup.*, 265, 266.

[3] *Dig.* xiv. 2. See Hunter, *Roman Law*, 4th ed., 514-516; Mackenzie, *Roman Law*, 7th ed., 266, 267.

[4] *Dig.* xiv. 2, 9.

for the common benefit, and but for the loss so sustained the others would have lost their property also, so that it was only equitable that the others should contribute towards making good the loss.[1]

Liability to contribute was only created if the jettison had been successful in saving the ship, and there was consequently no liability if the ship, notwithstanding, was lost.

Contribution could be demanded in respect of goods which, although saved, had been damaged; but the contribution was in proportion to their depreciated value. In estimating the amount of contribution a distinction was drawn between the value of the goods that had either been thrown overboard or had been damaged by sea water, and the value of those that had been saved. In the two former cases the value was considered to be the price that had been actually paid for them, but in the last case the value was the price which would be obtainable for them at the port of destination. The reason for this distinction was that all that equity demanded was that the owners of the goods saved should save the owner of the jettisoned goods from loss, but they should not be required to make a profit for him; whereas in the case of the goods that had been saved the true measure of their value as such was the price they would fetch at the port of destination.[2]

SECTION 152.—RECEPTUM NAUTARUM, CAUPONUM, STABULARIORUM

Quasi-contractual relations were also created in respect of the edict *Nautae Caupones*, under which "shipmasters, innkeepers, and stablers" were put under an absolute liability to restore, and for the loss of or damage to property that had been entrusted to them, unless the loss or damage had been caused by either inevitable accident (*damnum fatale*) or by superior force (*vis major*),[3] or by the negligence of the person himself who had entrusted the property to them.[4]

There were certain special forms of the *condictio indebiti* or the action to recover money paid that had not been legally owing; for example, an action was competent in order to recover a payment made in view of a lawful future event which, however, did not occur, such as a dowry (*dos*) paid in view of a marriage that did not ultimately

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[1] *Dig.* xiv. 2, 1; xiv. 2. 5. See, for examples, Hunter, p. 515; *Dig.* xiv. 2, 4 pr.; xiv. 2, 3; xiv. 2, 5; xiv. 2, 6; xiv. 2, 2, 3; xiv. 2, 2, 5.

[2] Dig. xiv. 2, 2, 4.

[3] *Dig.* iv. 9, 3, 1. See on *Damnum fatale*, *ante*, p. 347, and on *vis major*, also *ante*, p. 347.

[4] See also on the edict *Nautae Caupones*, *ante*, p. 346, Section 116 (3) (d), and *post*, p. 439, *re* "*quasi-delicts*," and Mackenzie, *Roman Law*, 7th ed., pp. 222-224.

take place.[1] So, also, an action might be competent for the recovery of money that had been paid in view of some wrongful future event, as, for example, money paid in order to prevent a person from committing a crime.

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[1] See on "Dowry" (*dos*), *ante*, Part II., Sections 41-45, pp. 158-164. A *dos* given before marriage was conditional upon that event taking place. See *ante*, p. 161.

CHAPTER XI

Obligations arising Ex delicto[1] (or Ex maleficio)—Delicts[2]

There are two great sources of obligation; one is contract, and the other is delict.

A "delict" (*delictum, maleficium*) is an unlawful act, but the obligation arising in respect of the act is either *ex delicto* or *quasi-ex delicto* according as it was wilfully committed in known violation of the law or was committed without any negligence or unlawful intention. It is not the intention that renders an act a delict or wrong.

A breach of contract is a violation of a personal right available against only a particular individual because of a contract or agreement either express or implied, but a delict is the violation of a person's right to a particular property or "thing" (*res*). In other words, a delict is a violation of a "real" right or right in a thing itself (*jus in re*)[3] enforceable against everybody. The term "thing" (*res*) in reference to delicts includes not only material and corporeal property but also such immaterial and incorporeal things as the right to security of person, property, and reputation—in other words the right to live unmolested, to enjoy undisturbed one's lawfully acquired property, and to have one's honour protected from false and malicious attacks.

The obligation in a contract is the result of agreement, either express or implied, but the obligation that arises from delict is one created by the law itself, apart from any agreement, and arises from the doing of the act.[4]

Delicts may thus be defined generally as offences or wrongs committed either intentionally or unintentionally in violation of the law.

It is a general rule of law that the commission of any wrongful act which causes damage to another person imposes upon the wrongdoer a liability to compensate the injured party, whether the injury arose from a positive act or from mere negligence or lack of foresight.

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[1] See also *ante*, Chapter IV., p. 303.

[2] See Justinian, *Inst.* iv. 1-4; *Dig.* xlvii.

[3] See on "Real Rights and Personal Rights," Part III., Section 69, p. 212.

[4] *Cf.* Justinian, *Inst.* iv. 1 pr.: *Nascuntur ex re, id est ex ipso maleficio;* also *Dig.* xliv. 7, 4: *Ex maleficio nascuntur obligationes*, etc.

Delicts are of two general kinds, namely — (1) public, and (2) private.

"Public" delicts are what are generally known as "crimes," and are such unlawful acts as are considered to be primarily injurious to the State or community as a whole, and are therefore punishable by public accusation and prosecution.

"Private" delicts or "wrongs," as distinguished from "crimes," are such acts as are considered to be harmful, either mainly or entirely, to private and particular individuals in the community, but not necessarily to the State as a whole.

The obligation created by "public" delicts is one of liability to punishment at the hands of the State for the violation of its laws; that created by "private" delicts is to compensate the private individuals whose real rights have been violated for the injury thereby caused to them.

In Roman Law the distinction between "public" and "private" delicts was between "public crimes" (*crimina publica*) and "private delicts" (*delicta privata*, or, simply, *delicta*). The former were offences against the State, while the latter were civil offences against particular private individuals.

The Roman Law treated as private delicts, or actionable civil wrongs, certain offences which in modern times are regarded as crimes or public wrongs; it regarded as delicts, moreover, only those acts which had been specially characterised as such by the ancient civil law, and the consequences of which were provided against by the attachment to the act of a particular action at law. It was only in respect of injury suffered through any such special acts that an obligation *ex delicto* arose; when an injury was sustained that was not so expressly characterised as a delict (*delictum*), and for which no special form of action was provided, an obligation was held to arise *quasi-ex delicto*.[1]

The rights arising from private delicts are treated in the *Institutes* of Justinian under four heads, namely:—(1) *Furtum;* (2) *Rapina;* (3) *Damnum;* (4) *Injuria.*

SECTION 153.—FURTUM[2]

This was secret theft. *Furtum* is the wrongful or felonious taking and carrying away, or the wrongful and felonious use or possession of the property of another person for the sake of gain.[3]

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[1] On quasi-delicts, see *post*, p. 437.

[2] See *Dig.* xlvii. 2; *Inst.* iv. 1; Gaius, *Inst.* iii. 183-208. See also Monro (C. H.), *De Furtis* (*Dig.* xlvii. 2), Cambridge University Press, 1893; Sandars, *Institutes of Justinian*, 8th ed., 399-409; Hunter, *Roman Law*, 4th ed., 232-241.

[3] *Cf.* definitions of *furtum* in *Dig.* xlvii. 2, 1, 3: *Furtum est contrectatio rei fraudu-*

Dishonest (*fraudulosa*) intention was requisite in order to constitute theft,[1] and, further, some overt act[2] was necessary in order to indicate the wrongful intention to derive benefit from the dishonest act.[3]

The theft (*furtum*) might be either of the thing itself, or of its use or possession; moreover, the taking or appropriating of the thing (*contrectatio rei*) might be either (*a*) to benefit oneself, or (*b*) to injure another, but in the latter case there was not theft (*furtum*), and the person would be liable for the damage (*damnum*) under the Aquilian law (*Lex Aquilia*), or for *injuria* if the act amounted to insult. Since a dishonest (*fraudulosa*) intention was essential, a person would not be guilty of *furtum* or theft if he appropriated the property in the honest belief either that it was his own, or if not his own, that he had the owner's consent to take it. In certain circumstances, however, a person might even steal his own property, such as, for example, a pledge (*pignus*)[4] in the lawful possession of one of his creditors,[5] or property for the time being usufructed by another person. Only movable things (*res mobiles*) could be the subject of theft,[6] but the term *furtum* included things moved from the soil, such as trees, fruits, crops, stones, sand, or chalk.[7] The term *furtum* or theft, moreover, was not confined to the dishonest taking of a thing from the possession of another, but was also applied to the dishonest appropriation or misuse of a thing belonging to another person that is already in one's possession, or over which one has real rights;[8] thus a depositary, or a creditor using, without the owner's consent, property deposited or pledged with him, as the case might be, or a commodatary (*commodatarius*) using the thing lent in a manner other than that intended in the contract, or a debtor selling hypothecated property without the consent of the creditor would be guilty of theft.[9]

In order to constitute theft it is further requisite that the thing

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losa lucri faciendi gratia vel ipsius rei vel etiam usus ejus possessionisve, and in *Institutes*, iv. 1, 1: *Furtum est contrectatio rei fraudulosa vel ipsius rei vel etiam usus ejus possessionisve.* See also note 3, *infra.*

[1] *Institutes*, iv. 1, 7.

[2] See as to overt acts evidencing intention, *post*, p. 424.

[3] This is indicated by the use of the words *lucri faciendi gratia* in the definition given in the *Digest* (*ut supra*). These essential words are omitted from the definition in the *Institutes* (*ut supra*), which is, in that respect, incomplete.

[4] See on *Pignus*, *ante*, Sections 117-121.

[5] Justinian, *Inst.* iv. 1, 10; *Dig.* xlvii. 2, 66 pr.; Gaius, *Inst.* iii. 20.

[6] This is probably implied from the use of the expression *contrectatio rei* in the definitions in both the *Digest* and the *Institutes.*

[7] *Dig.* xlvii. 2, 25, 2; xlvii. 2, 57.

[8] This is connoted in the definitions by the words *usus ejus possessionisve.*

[9] Justinian, *Inst.* iv. 1, 6, 7.

appropriated should be already the property of some one, so that there could not be theft of a *res nullius*,[1] but only of a *res in commercio* or *patrimonio*.[2]

In modern legal systems theft is treated as a crime or public delict, an offence against and punishable by the State; but the Roman Law, in common with other early systems, regarded theft as merely a private wrong (*delictum privatum*) or civil injury committed against a particular private individual; in the later Roman Law, however, the same delictual act might be pursued either as a crime or as a civil injury, or as both.

The Roman Law distinguished between (*a*) "manifest," and (*b*) "non-manifest" theft (*furtum manifestum* and *furtum nec manifestum*).[3]

"Manifest" theft, known as *furtum manifestum*, took place when the thief was caught, either in the act or near the spot where the theft was committed, with the stolen property in his possession. To be taken "in the act or near the spot" signified, under the law of Justinian, either the actual commission of the offence before the thief had left the premises, or, if he had actually left the premises, while he was in course of carrying away the property and had not yet reached the place where he intended to deposit it. In such a case the liability of the thief was to restore four times the value of the property stolen to the owner of it.[4] The value of the thing stolen was "the true price of the thing" (*rei verum pretium*), or its worth under all the circumstances of the case; for example, if a slave was stolen who was in a position to enter upon an inheritance at his master's bidding, and then died before entering, the value of the inheritance (*pretium haereditatis*) lost in that way was taken into account in estimating the value of the stolen property—*i.e.* the slave.[5]

"Non-manifest" theft, or *furtum nec manifestum*, was committed in those cases when the thief was not caught either in the act or near the spot with the stolen property in his possession. In such a case the thief was liable for only twice the value of the stolen property.

The distinction between the penalties in *furtum manifestum* and *nec manifestum* is supposed to be a survival of archaic ideas relating to the period of self-help in the obtaining of redress for offences against individuals. The thief caught in the act was more likely to suffer a more severe vengeance under the influence of the anger of the moment than if taken after an interval; in this view the infliction of a more severe penalty upon the thief caught red-handed was regarded as likely to

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[1] See *ante*, Part III., Section 68 (d), p. 206.
[2] See *ante*, Part III., Section 67 (h), p. 203.
[3] Justinian, *Inst.* iv. 1, 3; iv. 1, 5.
[4] *Inst.* iv. 1, 5; Gaius, *Inst.* 189, 190.
[5] *Dig.* xlvii. 2, 50 pr.; Sandars, *Institutes of Justinian*, 8th ed., 402.

induce the injured person to forego his private vengeance and submit the matter to judicial decision, for, "in the infancy of society it is an important object to the legislator to induce an injured person to have recourse to the public tribunals instead of righting himself, that is to say, constituting himself both law-giver and judge."[1] The retention of the more severe penalty under the later law was probably based upon the more reasonable ground that the thief taken in the act was usually more dangerous than the one caught subsequently.

A person who had not actually committed the theft might be liable notwithstanding, equally with the actual thief to an action and for the recognised compensation and penalties if by means of his help and advice the theft was committed.[2]

It has already been stated that some overt act was requisite, under the Roman Law, in order to indicate the wrongful intention to derive benefit from the dishonest act.[3]

The various overt ways in which *furtum* might manifest itself were thus—(*a*) the actual taking away of property, not necessarily of another person (*res alieni*), since a man might, in certain circumstances, steal property belonging to himself[4] (*res sua*); (*b*) the wrongful appropriation of the property of another person which is already lawfully in one's possession or detention, in the character, for example, of agent, depositary, creditor, usufructuary, and such like; (*c*) the wrongful appropriation on finding of property that has been lost;[5] (*d*) the disposal, in bad faith, of property belonging to another person; (*e*) the wrongful use of the property of another, of which one happens to have the lawful possession or detention upon a special title, for example, as hirer (*conductor*) or as borrower (*commodatarius*); (*f*) giving assistance or advice in the commission of the wrongful act; and (*g*) the wilful destruction of documentary evidence of debt.

Section 154.—Remedies or Actions arising out of Furtum

The remedies or actions arising out of *furtum* were fourfold, namely —(1) the *actio furti*; (2) a *vindicatio*; (3) an *actio ad exhibendum*; and (4) the *condictio furtiva*.

The *actio furti* or "action of theft" could be brought by any person who was responsible for the safety of the thing, whether he was the owner or not; in other words, the action was competent to any one

[1] Poste, *Institutes of Gaius*, 4th ed., 411, 412.

[2] *Ejus ope et consilio furtum factum est*; Justinian, *Inst.* iv. 1, 11. Cf. *Dig.* xlvii. 2, 36; xlvii. 2, 54, 4; Gaius, *Inst.* iii. 202.

[3] See *ante*, p. 422.

[4] See *ante*, p. 422.

[5] See *ante*, Part III., Section 73, p. 219.

whose interest it was that the thing should not be stolen.[1] The object of the *actio furti* was solely the recovery of the penalty. The thing itself could be recovered either by a *vindicatio* or by a *condicti*.[2]

In order, however, to entitle a person to sue the *actio furti* the interest required to be in connection with a right to possession or to detention, and an interest created by a mere right *in personam* did not render the action competent; thus the owner would not have any interest in the safety of the property, and could not therefore bring the action of theft if the loss would be made good to him by some other person who was responsible to him for, and consequently had an interest in, its safe custody, as, for example, a hirer, or a pledgee (but not a depositary),[3] or a fuller who had in his possession clothes to clean, or a tailor who had received clothes to mend, so long as that person was solvent and capable of satisfying the owner's claim.[4] So the purchaser of property could not sue the action of theft in his own name if the thing was stolen before delivery, for his interest in such a case arose from a mere right *in personam;* but he might insist that the right of action should be assigned to him.

A *vindicatio* could be brought by the owner against anyone in whose possession the stolen property was in order to recover it.[5]

An *actio ad exhibendum* could be brought by any person who was entitled to possession against any person declared to be in possession of the stolen property in order that it should be produced in Court.

A *condictio furtiva* was brought by the owner of the stolen property against the thief, either for the restoration of the stolen property or for compensation according to its value. The *condictio furtiva* might be brought against the heirs of the thief, but the *actio furti*, since it sought only to inflict a penalty for a personal wrong, could only be brough tagainst the wrongdoer himself. Every action against a thief, or against those who assisted him, might be brought by the heirs of any person entitled to bring it.[6]

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[1] Justinian, *Inst.* iv. 1, 13; *Dig.* xlvii. 2, 10; Gaius, *Inst.* iii. 203.

[2] Justinian, *Inst.* iv. 1, 19; *Dig.* xlvii. 2, 54, 3; Gaius, *Inst.* iv. 8.

[3] *Inst.* iv. 1, 17; *Dig.* xlvii. 2, 14, 3; Gaius, *Inst.* iii. 207.

[4] Cf. *Inst.* iv. 1, 15; *Dig.* xlvii. 2, 12 pr.; xlvii. 2, 20, 1; Gaius, *Inst.* iii. 205. Under the law of Justinian the case of the *commodatarius* was special, and the owner had the option of either bringing the *actio furti* against the thief or the *actio commodati* against the borrower (*Inst.* iv. 1, 16).

[5] Justinian, *Inst.* iv. 1, 19; *Dig.* xlvii. 2, 54, 3; Gaius, *Inst.* iv. 8.

[6] See Justinian, *Inst.* iv. 12. There were some old distinctions between various forms of theft, namely, *furtum conceptum*, *oblatum*, *prohibitum*, and *non-exhibitum*, which, although still existing in the time of Gaius (*Inst.* iii. 186-192), had fallen into disuse by the the time of Justinian (*Inst.* iv. 1, 4). See Sandars, 402.

SECTION 155.—RAPINA[1]

This was robbery or theft of movables, or of things that move themselves,[2] or forcible disturbance,[3] accompanied by the exercise of violence and superior force.

In order to constitute *rapina* it was essential that there should be, on the part of the wrongdoer, a wilful intention to take the property forcibly, if necessary;[4] if therefore a man honestly believing property to be his own took it by force, his violence, although unlawful, did not amount to *rapina* or robbery, and he was only liable to restore the property and to pay a penalty amounting to the value of the property.[5]

To *rapina* the Roman Law attached a penalty of four times the value of the property if action was brought within a year, but after the lapse of a year simple restitution or indemnity could alone be claimed.

The special *actio vi bonorum raptorum* was granted by the Praetorian Edict as a remedy for *rapina;* robbery was made a distinct delict subjecting a wrongdoer to this action by the edict of the Praetor Lucullus (77 B.C.), which was enacted with a view to checking the growing number of acts of violence resulting from the "Social war." The action, being penal, could not be brought against the heir of the thief. The penalty, although nominally quadruple, was, under the law of Justinian,[6] really only triple (*poena tripli*), for it included the value of the property, whereas in the case of the *actio furti* the penalty was over and above the value of the thing. The action *vi bonorum raptorum* was available to any person who had a legal interest in the property not being taken away by force, such as a hirer, borrower, pledgee, or usufructuary, and even a person having a mere detention of the property, and not the legal possession, such as a depositary,[7] although the interest of the last was not sufficient to entitle him to sue the *actio furti.* The reason why the existence of the slightest degree of interest was held to entitle a person to sue the *actio vi bonorum raptorum* was in order to render more severe and deterrent the punishment of a theft committed openly and flagrantly in violation of the law, than in the case of secret theft (*furtum*).

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[1] Justinian, *Inst.* iv. 2; *Dig.* xlvii. 8; Gaius, *Inst.* iii. 209; *Code*, ix. 33.

[2] Justinian, *Inst.* iv. 2, 1; *Dig.* xlvii. 8, 2, 12; *Code*, viii. 4, 7.

[3] Citations, *supra.*

[4] *Inst.* iv. 2, 1; *i.e.* the act must be committed *dolo malo.*

[5] Cf. *Dig.* xlvii. 8, 2, 20. A tax-gatherer who, in good faith, carried off cattle belonging to a farmer in order to satisfy a claim that, in fact, turned out to be unfounded, did not commit *rapina.*

[6] *Inst.* iv. 2 pr.

[7] Justinian, *Inst.* iv. 2, 2; *Dig.* xlvii. 8, 22, 24.

SECTION 156.—DAMNUM[1]

This delict, known strictly as *damnum injuria datum*, originated with the *Lex Aquilia* or "Aquilian law," which was a *plebiscitum*,[2] passed after the secession of the Plebeians, probably about B.C. 287, upon the proposition of the Tribune Aquilius, and which superseded the existing limited provisions of the Twelve Tables with regard to unlawful damage to property and to person.[3]

The term *damnum* by itself implied, generally, the diminution or deterioration of a man's property. In the *Institutes* of Justinian *damnum* is treated of almost entirely in connection with the *Lex Aquilia* in the special form of *damnum injuria datum*. In the *Digest*, however, *damnum* is dealt with more generally, according either as it has been already done or suffered (*damnum factum*), or is apprehended (*damnum infectum*), as, for example, if an adjoining house were likely to fall down.[4]

Damnum factum (or simply *damnum*) might be caused either by accident (*casu*) or intentionally. If caused intentionally it might either arise in the lawful exercise of a right, in which case no liability to make reparation would be involved,[5] or it might have been done wrongfully, without either legal right or justification, in which latter case it was *damnum injuria datum* and gave rise to a liability to make compensation to the injured person, under the *Lex Aquilia*, if the damage came within the scope of that statute, or, if it did not do so, then as the result of an *actio in factum*, adapted to the particular circumstances of the case.[6]

The *Lex Aquilia* was the foundation of the later developed Roman Law of reparation for injury causing patrimonial loss, and it established the *actio damni injuria*.[7]

> The early law, as expressed in the Twelve Tables, only provided remedies for unlawful damage in a few specified cases of common occurrence, and such cases were included under the terms *noxia* and

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[1] Justinian, *Inst.* iv. 3 ; *Dig.* ix. 2 ; *Code*, iii. 35 ; Gaius, *Inst.* iii. 210-219.

[2] See on "*Plebiscita*," *ante*, Part I., pp. 18 and 19.

[3] The Jurist Ulpian says (*Dig.* ix. 2, 1 pr.) that the provisions of the Twelve Tables upon these matters were repealed by the *Lex Aquilia*, but it is probably more correct to say that they were superseded by the wider operation and remedies of this statute.

[4] In the case of *damnum infectum* the owner of the endangered property might insist upon the owner of the property likely to do damage giving security against any loss so caused (*Dig.* xxxix. 2, 7 pr.).

[5] *Dig.* l. 17, 155.

[6] See on *damnum* generally, Sandars, *Institutes of Justinian*, 8th ed., 417, 418.

[7] *Inst.* iv. 3 pr. See *Dig.* ix. 2 ; see on *Lex Aquilia*, Poste's *Gaius*, 421-426 ; also Monro (C. H.), *Lex Aquilia* (*Dig.* ix. 2), Cambridge University Press, 1898.

nocere, but the meaning of these terms is not defined. The cases included in *noxia* or wilful injuries include both damage to property (*damnum*) and injury to the person (*injuria*), comprising such acts as maiming (*membrum ruptum*), breaking of bones (*os fractum*), setting fire to buildings, or corn, cutting down of trees, cattle trespass, and such like.

The *Lex Aquilia* consisted of three chapters; the first chapter provided that if anyone wrongfully killed the slave or cattle (*pecus*)[1] of another person, he should be liable to pay to that person the highest price that the property could have realised at any time during the preceding year.[2] The second chapter of the *Lex Aquilia* was obsolete in the time of Justinian;[3] the third chapter dealt with every kind of unlawful damage done to property of every kind, animate or inanimate, except the killing of slaves or cattle.[4] The Aquilian law applied to immovables as well as to movables, but it was confined mainly to damage to movable property, whether slaves, animals, or inanimate things.[5]

The principles of the *Lex Aquilia* were gradually developed by the interpretation of jurists, and by the Praetor granting forms of action in circumstances coming within the principle of the law indeed, but which did not fall within the strict terms of the statute; such actions were either *actiones utiles* or *actiones in factum*.[6]

An *actio* was said to be *utilis* when it was allowed in cases to which it was not strictly applicable, by the exercise of the equitable discretion of the Praetor, and the object of the action was attained by a modification of the terms of the *formula* so as to make it apply to the particular case.[7]

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[1] The term *pecus* or cattle applied to all animals which may properly be said to graze, and included horses, mules, asses, sheep, oxen, and goats. It came also to include swine, since they usually feed in herds; elephants and camels were also ultimately included as being beasts of burden. Dogs and wild animals did not come within the term (*Inst.* iv. 3, 1; *Dig.* ix. 2, 2, 2; xxxii. 65, 4).

[2] See Justinian, *Inst.* iv. 3 pr.; also *Inst.* iv. 3, 9, and 10; and Gaius, *Inst.* iii. 210; *Dig.* ix. 9, 2 pr.

[3] See *Inst.* iv. 3, 12; *Dig.* ix. 2, 27, 4. This chapter provided that an *adstipulator* who released the debtor by *acceptilatio* (see *Inst.* iii. 29, 1), in fraud of the principal stipulator, was to be liable for the whole amount of the loss thereby caused to the stipulator (see Gaius, iii. 215). The practice of employing adstipulators was quite obsolete by the time of Justinian. See on *adstipulatio*, as an accessory contract, Hunter, *Roman Law*, 4th ed., 563, 564.

[4] Justinian, *Inst.* iv. 3, 13; *Dig.* ix. 2, 27, 13-15; Gaius, iii. 217. For the terms of Chapters I. and III. of the *Lex Aquilia*, see *Dig.* ix. 2, 2 pr.; and ix. 2, 27, 5 respectively.

[5] Hunter, *ut supra*, 243.

[6] *Cf.* Justinian, *Inst.* iv. 3, 16; Gaius, *Inst.* iii. 219; *Dig.* ix. 2, 33, 1; iv. 3, 7, 7.

[7] Hunter, *Roman Law*, 244, *q.v.*

When cases presented themselves the circumstances of which were of the nature of the evil sought to be remedied by the Aquilian law, but which at the same time were neither met by the terms of the statute, nor included within the extended phraseology of an *actio utilis*, the Praetor introduced[1] the *actio in factum* adapted to the special circumstances of the particular case, the *formula* directing that if the fact should be found to be so-and-so, the judge (*judex*) was to pronounce in a particular way, without any reference to the authority of the statute.[2]

The extension of the scope of the *Lex Aquilia*, by means of juristic interpretation and by granting equitable actions, was in three directions relating respectively to (1) the person entitled to sue under the statute; (2) the nature of the wrongful act for which compensation was granted; and (3) the measure of damages.

As to the person entitled to sue the statute strictly contemplated only an action for *damnum injuria datum* at the instance of the owner (*dominus*) of the injured property,[3] but, just as the Praetor in time gave a remedy to an owner for indirect as well as direct damage, so he provided a remedy for persons having an interest in the *usefulness* of the property, although their interest might not amount to full ownership; thus, by means of equitable remedies, in the form of actions *utiles* or *in factum*, the benefits of the Aquilian law came to be extended to a *bona fide* possessor,[4] usufructuaries and usuaries,[5] a person having a servitude,[6] and to pledgees whose interest in the property pledged was prejudiced by the injury.[7] An exception, moreover, to the rule that a person having only a mere personal right (*jus in personam*) could not sue came to be introduced and recognised upon grounds of practical convenience, and a farm tenant (*colonus*) was given an action for damage to his crops, provided he gave security that the owner would not himself sue.[8] All these persons came to have remedies against the owner of the property himself if he had caused the damage.

With regard to the nature of the act for which a remedy was granted under the Aquilian law, the first chapter of that statute strictly applied only to cases of the direct killing of slaves, or anything falling within the category of *pecus*,[9] and the third chapter had reference only to

[1] *Dig.* xix. 5, 11. Cf. *Dig.* ix. 2, 53.
[2] Hunter, *ut supra*.
[3] *Dig.* ix. 2, 11, 6.
[4] *Dig.* ix. 2, 17.
[5] *Dig.* ix. 2, 11, 10.
[6] Cf. *Dig.* ix. 2, 27, 32.
[7] *Dig.* ix. 2, 17. See Hunter, 247, 248.
[8] *Dig.* ix. 2, 27, 14.
[9] As to *pecus*, see *ante*, p. 428, note 1.

direct damage (*damnum*) caused *corpore corpori*, or "by the body to the body," or, in other words, by direct actual bodily contact. By interpretation, however, the statute was extended to all cases where death was the consequence of the act, even although there had not been any actual bodily contact, as, for example, in the case of dropping a beam on a slave,[1] and by means of equitable actions the principle of the statute was extended to cases of indirect killing, such as where one man held a slave or animal while another killed it,[2] or one person pushed another who fell against a third, the last being killed thereby,[3] or a man starved a slave to death,[4] or one person startles a horse on which the slave of another is riding so that the slave is thrown off and killed.[5] In cases such as these the liability upon the person who indirectly caused the damage was said to be "to make good the cause of death,"[6] and this end was effected by means of an *actio in factum*.

With regard to the third chapter of the *Lex Aquilia* relating to wilful damage to property other than the killing of slaves and cattle (*pecus*), this came to be interpreted as applying to any form of destruction or deterioration of property, whether direct[7] or indirect;[8] and actions—either *utiles* or *in factum*—were granted by the Praetor in such cases of indirect damage as unmooring a boat so that it drifts away and is lost,[9] driving cattle into the field of another without the owner's authority and permitting them to eat there,[10] setting a dog on to attack another person,[11] or knocking money out of the hand of another person so that it is scattered and lost.[12]

It will be seen from what has preceded that the *Lex Aquilia* originally only afforded to an owner reparation for injuries directly inflicted by the wrongdoer upon his property (*corpore corpori*), but by means of equitable interpretation, and the granting by the Praetor of equitable actions the provisions of the Aquilian law came to be extended to damage indirectly caused either to the owner of the property or to certain persons having an interest in it less than ownership.[13]

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[1] *Dig.* ix. 2, 11, 4.
[2] *Dig.* ix. 2, 11, 1.
[3] *Dig.* ix. 2, 7, 3.
[4] *Dig.* ix. 2, 9, 2.
[5] *Dig.* ix. 2, 9, 3. *Cf.* Justinian, *Inst.* iv. 3, 16; Gaius, *Inst.* iii. 219.
[6] *Causam mortis praestare.*
[7] *Cf.* Justinian, *Inst.* iv. 3, 13; *Dig.* ix. 2, 27, 13, 15; ix. 2, 27, 19.
[8] Justinian, *Inst.* iv. 3, 16; Gaius, *Inst.* iii. 219.
[9] *Dig.* ix. 2, 29, 5.
[10] *Code*, iii. 35, 6.
[11] *Dig.* ix. 2, 11, 5.
[12] *Dig.* ix. 2, 27, 21; xix. 5, 14, 2. See for further examples, Hunter, 244, 245.
[13] *Inst.* iv. 3, 16.

Under the extended principles of the *Lex Aquilia* a person was liable for patrimonial damage caused directly or indirectly by his fault or negligence, as well as for injury or loss occasioned by his *dolus* or wilful wrongdoing; but there was no liability for injury caused without either intention or fault, or by inevitable accident (*damnum fatale*),[1] or in self-defence;[2] in other words, it was requisite, in order to create liability under the enlarged operation of the Aquilian law, that the damage (*damnum*) should have been either intentional, or due to carelessness.[3] Thus, if a soldier while practising with his weapon on a space of ground that was specially appropriated to military exercises caused injury to a passer-by, there would be neither fault nor liability on his part, because the act was one which it was his duty to perform, and the place where he did it was the proper one; so that any person there without right took the risk of accident.[4] So also if a man was pruning a tree in the middle of a field, or far from any public way or road, and a branch fell on a passer-by he would not be liable for fault even although he might not have warned him, for the stranger had no right to be where he was, and took thereby the chance of injury; if, however, the tree was close to a public road, or to a right of way, the person cutting the branches would be liable for fault if he did not warn passers-by.[5]

If the person injured is himself negligent there is no liability, because his carelessness has contributed to the injury, and but for his "contributory negligence" he might not have suffered the injury; he could only claim compensation if either he did not foresee the danger, or could not have avoided it even if he had seen it; but there is no remedy for a person who seeing the danger, and being able to avoid it, makes no effort to so.[6] If, however, the damage was caused wilfully and maliciously there would be liability even although there had been gross carelessness and contributory negligence on the part of the injured person. In certain circumstances unskilfulness was regarded by the Roman Law as amounting to fault (*culpa*), and a person who exercised a profession or a trade without being properly qualified to do so was liable for all damage that might be caused through his lack of skill, his fault consisting in undertaking work which he knew or ought to have known he was unable to properly perform.[7] Thus a physician was

[1] *Inst.* iv. 3, 3.
[2] *Inst.* iv. 3, 2. Cf. *Dig.* ix. 2, 11 pr.
[3] See *Inst.* iv. 3, 4-5; *Dig.* ix. 2, 9.
[4] Justinian, *Inst.* iv. 3, 4; *Dig.* ix. 2, 9, 4.
[5] *Inst.* iv. 3, 5; *Dig.* ix. 2, 31.
[6] *Dig.* ix. 2, 28, 1. Hence the maxim "*volenti non fit injuria.*"
[7] *Imperitia culpae adnumeratur* (*Dig.* l. 17, 132). See *ante*, pp. 391, 392.

liable if, by the unskilful performance of an operation upon a slave, or by the administration of wrong remedies, it died;[1] so also he would be guilty of *culpa* if, although possessing sufficient skill, he neglected to attend to the case after the operation, and the slave consequently died.[2]

There may, indeed, be circumstances in which a person deliberately inflicts damage upon another person's property in order to prevent greater loss to himself, and yet does not thereby incur liability; thus if a house on fire was pulled down to prevent the spread of the flames the owner would have no remedy unless he could show that the damage was done in panic and from an unreasonable estimate of the danger;[3] or if a ship is driven by stress of weather in a storm among the ropes mooring another vessel, or gets entangled in fishermen's nets, and the only apparent way to escape the danger is by cutting some of the ropes, or the nets, there would be no liability for so doing.[4]

With regard to the measure of the damages awarded under the *Lex Aquilia*, the words of the statute itself seem to have contemplated only the actual value of the property destroyed or damaged, but by juristic interpretation the measure of the damage came to be extended to the loss in any way suffered by the injury.[5] The measure of the damages thus came to include (*a*) supervening loss (*damnum emergens*), and (*b*) gain which should have accrued to the injured person but for the wrongful act (*lucrum cessans*); so if, for example, one of a pair of mules, or of a team of horses, or of a band of performing slaves was killed, account had to be taken, in estimating the damage, not only of the value of the thing destroyed but also the supervening loss represented by the diminished value of what remained; or, if a slave that had been instituted heir by some one was killed before entering on the inheritance, the value of the inheritance so lost required to be taken into account besides the actual value of the dead slave.[6]

Damage caused by animals was in a somewhat special category. Such injury was denoted by the term *pauperies*, which signified damage done without wrong intent, "since animals, being without reason, cannot be said to have wrong intent."[7] The Twelve Tables gave a noxal action *de pauperie* against the owner of a domestic animal which, contrary to the usual nature of its kind, caused damage without being

[1] *Inst.* iv. 3, 7; *Dig.* ix. 2, 7, 8; ix. 2, 8 pr.; l. 17, 132.
[2] *Inst.* iv. 3, 6; *Dig.* ix. 2, 8 pr.
[3] *Dig.* ix. 2, 49, 1.
[4] *Dig.* ix. 2, 29, 3.
[5] *Dig.* ix. 2, 21, 2: *Et hoc jure utimur, ut ejus, quod interest, fiat aestimatio.*
[6] Justinian, *Inst.* iv. 3, 10; *Dig.* ix. 2, 22, 1; Gaius, iii. 213.
[7] *Inst.* iv. 9 pr.; *Dig.* ix. 1.

provoked to do so, as in the case of a vicious ox goring, or a bad-tempered horse kicking.[1] The action *de pauperie* did not apply in the case of a wild animal, for in doing damage it would be acting simply in accordance with its nature. The distinction drawn by the Roman Law was that between animals of a naturally fierce inborn disposition, such as a lion or a tiger, and animals ordinarily tame by nature but possessing in particular cases confirmed vicious habits. The Twelve Tables applied strictly to quadrupeds doing damage,[2] but all animals came to be held included under the term *quadrupes*. There was an analogy between injury done by animal and injury done by a slave; when the latter did an act which would be wrongful in the case of a freeman it was styled *noxia*,[3] and the injurious act of an animal contrary to the usual nature of its kind was called *pauperies;* moreover, just as responsibility for injurious acts fell upon the owner of the slave, so did liability for injuries caused by an animal rest upon the person to whom for the time being it belonged.[4]

If the damage was caused by reason of the animal being provoked, whether by the owner or by some other person, an action under the *Lex Aquilia* or an analogous action *in factum* was competent against the person who caused the animal to do the damage.[5] There would not be any liability upon the owner of a fierce dog which was chained in a house, and which bit someone who accidentally stumbled upon it;[6] but, on the other hand, the owner would be liable if he were to take such a savage dog into a place where its fierce temper might be excited, or if it escaped and caused damage by not being sufficiently under control.[7] The direct noxal action *de pauperie* did not apply in the case of damage done by wild animals—*i.e.* animals fierce by nature and instinct—such as a lion, or tiger, or bear, but the person in whose keeping such an animal might be was liable to an *actio utilis*.

If a wild animal escaped and subsequently caused damage, there was no noxal action competent against the former owner, because, on its escape, it became at once a *res nullius*, and ceased to be the property of its former owner.[8] Such damage might, however, come within the terms of the Aedilician Edict, which referred to animals whose acts did not come within the category of *pauperies;* it prohibited any man

[1] *Inst. ut supra; Dig.* ix. 1, 1 pr., 3, 4, 7, 10.

[2] *Dig.* ix. 1, 1 pr.

[3] See *Inst.* iv. 8 pr. 1; *Dig.* ix. 1, 1, 1; ix. 4, 1; Gaius, *Inst.* iv. 75.

[4] *Dig.* ix. 1, 1, 12.

[5] *Dig.* ix. 1, 1, 4.

[6] *Dig.* ix. 1, 2, 1.

[7] *Dig.* ix. 1, 1, 5. Damage done by dogs was also dealt with by a statute called the *Lex Pesolania*, mentioned by the jurist Paul in *Sent.* i. 15, 1.

[8] *Inst.* iv. 9, pr. See *ante*, Part III., Section 73, at p. 218.

from keeping, where there was a public road, a dog, a boar, a wild boar, a wolf, a bear, a panther, or a lion, or any other animal likely to do injury, and if this prohibition was disobeyed and a freeman was injured the master of the animal was liable in damages at the discretion of the judge and to a penalty of 200 *solidi* if a freeman was killed, and in other cases of injury to a penalty of twice the amount of the damage done.[1]

SECTION 157.—INJURIA [2]

In its general sense the term *injuria* was used to signify every action contrary to law;[3] it was also employed, however, in three special senses to mean (1) a wrongful act done without legal right (*nullo jure*); (2) the fault committed by a judge in giving an unjust judgment, or one contrary to *jus;* and (3) a public outrage or insult. It is of *injuria* in the third special sense that the *Institutes* of Justinian treat as a delict. *Injuria* as an outrage or an insult might be either real or verbal; it might be either (*a*) an injury intentionally committed by one person upon the body of another person, such as an assault, or (*b*) an injury maliciously done to a person's reputation, either directly or indirectly,[4] as, for example, by a slander or a libel. *Injuria,* therefore, in the special sense of a delict, was thus a wrong maliciously done by one person, or by another person at his instigation,[5] to the right of another person to safety, and to reputation; and it might take the form of either personal bodily injury, or slander, or libel,[6] in words,[7] or in writing,[8] whether private or public, as, for example, by maliciously seizing and advertising for sale the goods of a person, as if he were insolvent, or an absconding debtor,[9] or by writing defamatory prose or verse,[10] or by publicly insulting or mobbing a particular individual as by assembling before his house or shop in order to annoy him, or by shouting out scandal about him to a crowd.[11] The injured person had as remedy the *actio injuriarum,* by means of which he could

[1] Justinian, *Inst.* iv. 9, 1; *Dig.* xxi. 1, 40-42; xliv. 7, 60. Cf. Moyle, *Institutes of Justinian,* 5th ed., 580.

[2] Justinian, *Inst.* iv. 4; *Dig.* xlvii. 10; *Code,* ix. 35.

[3] *Omne quod non jure fit* (*Inst., ut supra*).

[4] *Inst.* iv. 4, 2.

[5] Cf. *Inst.* iv. 4, 11; *Dig.* xlvii. 10, 11 pr.

[6] Cf. *Inst.* iv. 4, 1; Gaius, *Inst.* iii. 220.

[7] Cf. *Code,* ix. 9, 35, 9, 10; ix. 35, 3.

[8] Cf. *Inst, ut supra.*

[9] *Inst., ut supra;* Gaius, *ut supra.*

[10] *Inst., ut supra;* Gaius, *ut supra.*

[11] *Dig.,* xlvii. 10, 15, 9; xlvii. 10, 15, 11; xlvii. 10, 15, 7. This offence was known as *convicium,* and is explained to this effect by Ulpian in *Dig.* xlvii. 10, 15, 4. It was specially created such by the Praetor (*Dig.* xlvii. 10, 15, 2).

claim reparation for the injury done to his person or to his property as the case might be, whether direct or indirect. In order, however, to found the *actio injuriarum* the *injuria* required to be either actually or constructively intentional and not merely the result of negligence.[1] The term *injuria* thus included all wilful hurt to the body, which extended to a threat of personal violence if it was accompanied with an apparent serious intention of immediately inflicting it,[2] and an intention to injure another person's reputation, whether (*a*) by words, or (*b*) by writing, or (*c*) by acts.

Thus it was an "injury" (*injuria*) to seize a person's goods for debt and put them up for sale as if he were insolvent knowing that he did not owe anything,[3] or to demand a debt that is not due from another person in order to injure his credit,[4] or to pass over a solvent debtor as if he were insolvent, and sue his sureties in order to injure his credit,[5] to refuse a solvent surety in order to defame him by doing so,[6] to apprehend a person as a fugitive slave, or to bring an action claiming a person as a slave in the knowledge that he is a free man.[7] It was also an *injuria* to persist in following about a respectable woman or a young boy or girl, or to make an attempt upon anyone's chastity;[8] the act of persistent pursuit itself was considered as constituting a reflection upon the character.[9]

In order to constitute a slander or libel the statements require to be not merely defamatory but false, so that the fact that the statement was true would constitute a good defence to an action.[10]

Any injury (*injuria*) might be specially serious by reason of the nature of the act, or the nature of the place where the act is done, or the rank of the person injured, or the particular part of the body affected; in such cases there was said to be *atrox injuria* or "aggravated injury," which proportionately increased the damages awarded.[11]

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[1] *Dig.* xlvii. 10, 3.

[2] *Dig.* xlvii. 10, 15, 1.

[3] Justinian, *Inst.* iv. 4, 1.

[4] *Dig.* xlvii. 10, 15, 33.

[5] *Dig.* xlvii. 10, 19.

[6] *Dig.* ii. 8, 5, 1.

[7] *Dig.* xlvii. 10, 12; xlvii. 10, 22. See Hunter, *Roman Law*, 4th ed., 149.

[8] *Inst.* iv. 4, 1; Gaius, iii. 220.

[9] *Dig.* xlvii. 10, 15, 22.

[10] *Dig.* xlvii. 10, 18, 4; *Code*, ix. 35, 10. See also *Dig.* xlvii. 10, 18 pr.; *Code*, ix. 35, 5.

[11] Justinian, *Inst.* iv. 4, 9; *Dig.* xlvii. 10, 7, 8; xlvii. 10, 8, 9, 1, 2. See as to the measure of damages, Justinian, *Inst.* iv. 4, 7. In the ordinary case the Praetor permitted the parties to make their own estimate, but the judge could yet award damages in his own discretion (*Inst.* iv. 4, 7). In the case *atrox injuria*, however, the Praetor himself fixed the maximum compensation, which as a rule the judge (*judex*) could not modify (Gaius, *Inst.* iii. 224).

The *actio injuriarum* was open to each person who had been injured by the act complained of; "a man may receive an injury not only in his own person but in that of his children *in potestate*, and in that of his wife."[1] In the case of a married woman, for example, she, her husband, her father, and her husband's father, had each an action, although if she and her husband were *in potestate* they could not themselves sue except in certain circumstances, such as the absence of the *paterfamilias*. The action would be brought by the *paterfamilias*, who could sue either in his son's name or in his own. Moreover, although the wife was in the power of the father yet her husband could always bring an action for injury done to her, based on his natural duty to protect her.[2] It was optional, under the *Lex Cornelia* (B.C. 81), for the injured person to proceed against the offender either by a civil action or by a criminal prosecution.[3]

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[1] Justinian, *Inst.* iv. 4, 2.
[2] Sandars, 419, 420.
[3] *Dig.* xlvii. 10, 5, 6, 7; xlviii. 2, 12, 4.

CHAPTER XII

Obligations arising Quasi ex Delicto—Quasi-delicts [1]

A "QUASI-DELICT" was an actionable wrong arising from circumstances resembling a delict, but which did not fall within the limited and arbitrary category of delicts (*delicta*), strictly so styled in the Roman Law; it might be committed without any wrongful intention, or negligence, or even, it might be, knowledge on the part of the person whom the law held liable, and to whose fault it was not directly imputable.

The examples of obligations created *quasi ex delicto* given in the *Institutes* [2] of Justinian are the cases of (1) "the judge, who makes a cause his own" (*judex qui litem suam facerit*),[3] (2) the *actio de effusis vel dejectis*,[4] (3) the *actio de positis et suspensis*,[5] (4) *dolus*, or *furtum*, on the part of the servants of the master of a ship, inn, or stable.[6]

A judge (*judex*) who through favour, corruption, fear, or even mere ignorance of the law gave a manifestly unjust sentence thus made the suit (*lis*) his (*sua*), inasmuch as he was thereby affected by it through becoming liable to an action on the ground of the sentence.[7] If the judge gave a wrong judgment by reason of *dolus* he was liable to be condemned in the whole amount involved in the litigation,[8] and if he acted from *culpa* or carelessness, he was liable to be condemned in an action in such damages as the judge in his discretion should assess.[9]

The liability of an ignorant physician to an action for fault under the *Lex Aquilia*, and that of an ignorant judge to an action for fault *quasi ex delicto*, was based upon the distinction that the injury caused by the unskilful physician was done to the body (*corpori*). "The

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[1] See Justinian, *Inst.* iv. 5 ; *Dig.* xliv. 7, 5, 4-6.

[2] *Inst.* iv. 5.

[3] *Inst.* iv. 5 pr. ; *Dig.* l. 13, 6.

[4] *Inst.* iv. 5, 1.

[5] *Inst.* iv. 5, 1, 2.

[6] *Inst.* iv. 5, 3.

[7] *Dig.* v. 1, 15, 1. Gaius gives an example of a judge "making a cause of his own" by condemning a defendant in a sum different from that fixed in the *formula* (Gaius, *Inst.* iv. 52).

[8] *Dig.* v. 1, 15, 1.

[9] *Dig.* l. 13, 6. Cf. *Poste's* Gaius, 4th ed., 501.

severity of the penalty against a judge who was merely ignorant of the law, is owing probably to the great checks against ignorance which the *judex* possessed, if he pleased to avail himself of them on the advice of the *prudentes*,[1] whose business it was to assist him, and in the possibility of having recourse to the magistrate who had given the action to him."[2]

The occupier of a house, or an apartment, whether as proprietor, hirer, or gratuitously, had imposed upon him by law an obligation *quasi ex delicto* (or *maleficio*), which was enforceable by the *actio de effusis vel dejectis*, to make good double any loss or injury caused by anything being "poured or thrown" from the windows if they overlooked or were near a public thoroughfare, even although the act was done, without the knowledge of the occupier, by members of his family, or by his servants, or even by a stranger, such as a guest.[3] The liability was in such a case imposed upon the occupier by the Praetor, for the protection of the public; but if he had not himself done the injurious act he had a right of recourse, by means of an action *in factum*, against the actual wrongdoer. If the offender was a *filius-familias* or a slave their *peculium* was liable to make good the damage. If the occupier was a *filiusfamilias* living apart from his father no action lay against the latter, but against the son alone;[4] the same rule also held good in the case of a *filiusfamilias* who was a *judex*, and made a cause his own.[5] In such cases the occupier could not be sued under the *Lex Aquilia*, because the injury was not directly attributable to him.

Similarly if a person kept something "placed or suspended" over a public thoroughfare or way which, if it fell, was likely to injure passers-by, there was thereby created by the Praetorian Edict,[6] for the public protection, a penal offence, *quasi ex delicto*, which subjected the wrongdoer to be sued in the *actio de positis et suspensis* for any injury that might have been caused; but since this was a penal action introduced by the Praetor in the public interest it was not necessary that any actual injury should have been done, and the wrongdoer might be compelled to remove the source of danger if injury was merely apprehended.[7]

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[1] See on *prudentes*, Part I., Section 8, *ante*, pp. 34-39.

[2] Sandars, *Institutes of Justinian*, 8th ed., 424.

[3] *Inst.* iv. 5, 1; *Dig.* xliv. 7, 5, 5; ix. 3, 5, 6; ix. 3, 1 pr.; ix. 3, 7.

[4] Justinian, *Inst.* iv. 5, 2; *Dig.* xliv. 7, 5, 5; v. 1, 15 pr.

[5] See *ut supra*.

[6] For the terms of the edict with reference to the circumstances instanced in *Inst.* iv. 5, 1, see *Dig.* ix. 3, 1 pr.; ix. 3, 5, 6.

[7] Justinian, *Inst.* iv. 5, 1; *Dig.* xliv. 7, 5, 5; ix. 3, 5, 6; ix. 3, 1 pr.; ix. 3, 7.

"Shipmasters, innkeepers, and stablers" (*nautae, caupones, et stabularii*) were liable *quasi ex delicto* (or *maleficio*) for the loss or damage owing to theft (*furtum*) or fraud (*dolus*) on the part of any one employed by them, this liability being based upon the principle that an employer is in fault or negligent if he employs dishonest servants.[1] The action against the employer, if innocent, was not under the *Lex Aquilia*, but was *in factum conceptum*;[2] it was for double the value of the thing damaged or lost,[3] and might be brought by, although not against, the heir.[4] The person who had suffered the loss or damage had also the option of suing against the servant actually in fault an *actio furti* or an *actio legis Aquiliae*.[5] The liability of "shipmasters, innkeepers, and stablers" for loss or damage caused by reason of the dishonesty of their servants was distinct from that imposed upon them by the Praetorian Edict "*Nautae Caupones*," to restore, uninjured, property that had been entrusted to or deposited in their care, which arose *quasi ex contractu*.[6]

An owner, or even a possessor, of property, such as slaves, or animals that had done damage to the property of some other person, was, in certain circumstances, liable to a "noxal" action,[7] even although the damage had been done without his knowledge or against his will; if, however, there was no actual fault on his part, he might free himself from further liability by "noxal surrender" (*noxae deditio*), or giving up to the injured person the thing that had done the damage. A distinction was drawn between animals that are fierce by nature (*ferae naturae*), and those of a more or less domesticated character (*mansuetae naturae*), in which latter case the same degree of care was not required by the law, unless the animal was known to be vicious or dangerous.

Justinian does not actually class noxal actions under obligations *quasi ex delicto*, but, in principle, they undoubtedly fall within that category.

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[1] *Inst.* iv. 5, 3; *Dig.* xliv. 7, 5, 6; ix. 3, 5, 13.

[2] *Inst. ut sup.*

[3] *Dig.* xlvii. 5, 2.

[4] *Inst. ut sup.*

[5] *Dig.* xlvii. 5.

[6] *Dig.* iv. 9. See *ante*, p. 302, and also Section 116 (3) (d), *ante*, p. 346.

[7] The term *noxa* signified the body, *i.e.* the slave or animal that had done the damage, while *noxia* was the wrongful act itself, *e.g.* the theft, damage, robbery, or injury (*Inst.* iv. 8, 1; *Dig.* ix. 1, 1, 1).

CHAPTER XIII

Cautionary Obligations

Suretyship[1]

The performance of an obligation may be secured or guaranteed by either (*a*) a real or (*b*) a personal surety. A "real" surety in the Roman Law was such a thing as a *pignus*[2] or a hypothec;[3] but a person might also bind himself personally to fulfil the obligation of another in the event of that other person failing to do so.[4] The consent or knowlege of the debtor was unnecessary.[5] The contracts by which, in the time of Justinian, a person might bind himself to make good to the creditor another person's obligation were three in number—namely, *fidejussio*, *constitutum*,[6] and *mandatum qualificatum*.[7] There were two other forms of suretyship known to the Roman Law under the names of *sponsio* and *fidepromissio* respectively, but they were obsolete by the time of Justinian.

The use of the *sponsio* was confined to Roman citizens; it was created by formal stipulation, and could be accessory only to a verbal contract; and *fidepromissio*, although competent to aliens as well as to citizens, was also, like the *sponsio*, only accessory to a verbal contract,[8] and both of these forms were otherwise much restricted in their operation, for they did not bind the heirs of the surety, the liability of both sponsors and fidepromissors was limited to two years, and each surety was liable for only his proportionate share of the whole debt thus secured,[9] any excess of which could be recovered by action from the co-

[1] Justinian, *Inst.* iii. 20; *Dig.* xlvi. 1; *Code*, viii. 41; Gaius, *Inst.* iii. 115-127; see also Hunter, *Roman Law*, 563-579; Sandars, *Institutes of Justinian*, 353-358; Moyle, *Institutes of Justinian*, 4th ed., 422-427; Poste, *Institutes of Gaius*, 4th ed., 353-361; Buckland, *Principles of Roman Law*, 256-260; Cuq, *Institutions Juridiques des Romains*, ii. 543-559; May, *Éléments de Droit Romain*, 8th ed., 453-462. *Cf.* French Civil Code, Arts. 2011-2048.

[2] See *ante*, p. 348.

[3] See *ante*, p. 351.

[4] *Cf.* French Civil Code, Art. 2011.

[5] *Dig.* xlvi. 1, 30; xiii. 5, 27.

[6] Otherwise known as the *pactum de constituta pecunia*. See *post*, p. 442.

[7] This was the special name attached by civilians to surety when created by mandate. See *post*, p. 442, and also *ante*, p. 405.

[8] *Cf.* Gaius, *Inst.* iii. 92, 93; iii. 118, 119.

[9] This was effected by the *Lex Furia de Sponsu*, passed about B.C. 95. See Gaius, *Inst.* iii. 121.

sureties,[1] and in order that the sureties should remain liable the creditor had to declare the amount of the debt and the number of sponsors, or of fidepromissors, by whom the debt was to be guaranteed.[2]

Fidejussio[3] as a form of suretyship came into use during the later Roman Republic; it was usually made in the form of a verbal stipulation, but it might also be in writing.[4] It was much wider in its operation than the earlier forms of suretyship, the *sponsio* and *fidepromissio;* thus it might competently be accessory to any form of obligation,[5] whether civil or natural, present or future, whether contracted *re, litteris, verbis,* or *consensu,*[6] and it might even be accessory to an obligation arising *ex delicto;*[7] moreover, *fidejussio* could itself be the basis of an action, even although the obligation to which it was accessory was not itself actionable; thus, in the case of a natural obligation the surety might be liable to an action while his principal could not be sued. A *fidejussor* bound not only himself but his heirs,[8] and where there were several sureties each was bound, without any right of relief or contribution from the others, to the whole extent of the debt, and the creditor could demand the whole from any one he pleased, until a rescript of the Emperor Hadrian gave "the benefit of division" (*beneficium divisionis*), in respect of which one of several sureties, who was sued by the creditor, could claim to have the debt divided proportionately amongst the other sureties who were solvent.[9] This right did not operate *ipso jure,* but required to be expressly claimed by the surety; whereas, in the cases of both sponsors and fidepromissors a right of contribution arose *ipso jure;* moreover, the duration of the liability of sponsors and fidepromissors was fixed by the *Lex Furia de Sponsu* (*circa* B.C. 95) at two years, but there was no limitation of time in regard to the liability of *fidejussors,* because the *Lex Furia* did not apply to them.

A *fidejussor* was not liable for a greater sum than that owed by his

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[1] Gaius, *Inst.* iii. 122. This right to recover by action was given by the *Lex Appuleia,* B.C. 102.

[2] This was in virtue of the *Lex Cicercia,* the date of which is uncertain. See Gaius, *Inst.* iii. 124.

[3] *Fidejussio* was a form of what was called *intercessio,* which was a general term used in Roman Law to signify either the addition or the substitution of a new debtor; in the former case there was "cumulative," and in the latter case "privative" *intercessio.* See Poste, *Institutes of Gaius,* 4th ed., 356-358.

[4] *Inst.* iii. 20, 8.

[5] *Dig.* xlvi. 1, 1.

[6] Justinian, *Inst.* iii. 20, 1; iii. 20, 3; *Dig.* xlvi. 1, 8, 1, 2; xlvi. i. 8, 70, 3; xlvi. 1, 6 pr., 2; Gaius, *Inst.* iii. 119.

[7] *Dig.* xlvi. 1, 8, 5.

[8] Justinian, *Inst.* iii. 20, 2; *Dig.* xlvi. 1, 4, 1.

[9] *Inst.* iii. 20, 4; *Dig.* xlvi. 1, 26; Gaius, *Inst.* iii. 121.

principal, because his obligation was only accessory to that of the latter,[1] and he might be liable for less if he claimed what was known as "the benefit of discussion" (*beneficium ordinis*, or *discussionis*, or *excussionis*), which was introduced by Justinian,[2] and asked that the creditor should first sue the principal debtor and thereafter sue the surety for what he could not recover from the former. The creditor, however, might evade this demand if he could show that the exercise of the "benefit of discussion" would be useless, by reason of either the debtor's insolvency, or of his absence beyond the jurisdiction.[3]

The *fidejussor* or surety had also the benefit of another right, if he chose to exercise it, when he was sued by the creditor without the latter having previously sued the principal debtor. In such cases, if he was willing to pay the whole debt, he could demand, before satisfying the creditor, that the latter should transfer to him all his rights of action, and also all securities held by him in respect of the debt; and if the creditor refused to do so, and continued to sue the surety, he could be met by the defence of bad faith (*exceptio doli mali*).[4] This right of subrogation possessed by a *fidejussor* was known as the *beneficium cedendarum actionum* or "the benefit of the transfer of actions." The reason why it was necessary that the surety who was willing to pay the whole debt should demand an assignation of all the creditor's rights in respect of the debt before satisfying the creditor, was that the demand would be useless after payment, for the debt would be then discharged, and the rights of action being then discharged could no longer be assigned.[5] The *beneficium cedendarum actionum* was often more advantageous to the surety (*fidejussor*) than if he were to claim the "benefit of division" (*beneficium divisionis*) under the edict of the Emperor Hadrian, because such pledges as might be in the possession of the creditor were transferred to the surety at the same time as the former ceded his rights of action.[6]

From the time of the later Republic, or of the Early Empire, suretyship might also be created by a mere informal agreement or "pact" (*pactum*) to pay the debt of another person on a fixed day; such an agreement was known as *constitutum* or *pactum de constituta pecunia*.[7] Suretyship might be created also by mandate (*mandatum*), as when a

[1] *Inst.* iii. 20, 5; *Dig.* xlvi. 1, 8, 7; Gaius, *Inst.* iii. 113, 126.

[2] *Nov.* iv. 1.

[3] See on the *beneficium ordinis*, Hunter, *Roman Law*, 568, 569.

[4] *Dig.* xlvi. 1, 17; xlvi. 1, 59.

[5] *Cf.* Moyle, *Institutes of Justinian*, 4th ed., p. 424.

[6] *Cf.* Sandars, *Institutes of Justinian*, 8th ed., 357.

[7] Cf. *Dig.* xiii. 5, 5, 3; xiii. 5, 25; *Nov.* 115, 6; Hunter, *ut supra*, 570, 571. See also *ante*, p. 440.

person directs another to lend money to a third person;[1] in such a case there was considered to be an obligation upon the first party, who had offered himself as *mandator pecuniae credendae*, to indemnify the creditor or lender if the third party—*i.e.* the borrower—failed to fulfil his obligation.[2] When, however, suretyship was thus created by mandate, there was no liability upon the surety until the loan was actually made.

The liability under suretyship in the form of both *constitutum* and of mandate was unlimited in regard to time, and extended to the whole amount of the debt, just as in the case of *fidejussio;* but the surety was entitled to the various privileges and benefits (*beneficia*) of "discussion" (*discussionis*), of "division" (*divisionis*), and of cession of rights of action (*cedendarum actionum*), which have been already mentioned. The *Senatus-Consultum Velleianum*, which was passed about 46 A.D. in the reign of the Emperor Claudius, declared that a cautionary obligation entered into by a married woman was invalid; but Justinian modified this provision of the law to the extent of recognising such an obligation if it had been constituted in the form of a probative written document signed and evidenced by three witnesses of good repute. Such an obligation, however, if contracted by a wife on behalf of her husband, was invalid even although it was expressed in a written and properly attested document;[3] moreover, the provisions of the *S.-C. Velleianum* did not apply if the woman's obligation on behalf of the other person (*intercessio*) was made for a valuable consideration or with reference to her dowry (*dos*).

It will thus be seen that suretyship[4] in Roman Law was either (*a*) personal or (*b*) real. "Personal" sureties were such forms as *sponsio, fidepromissio, fidejussio, constitutum*, and *mandatum qualificatum* (which were either (*a*) *stricti juris*, as *sponsio, fidepromissio*, and *fidejussio*, or (*b*) *bonae fidei*, as *mandatum pecuniae credendae*, and the Praetorian pact *constitutum*), while the real sureties were the contracts of *pignus*[5] and hypothec.[6]

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[1] *Dig.* xvii. 1, 12, 13; Hunter, 570. See also *ante*, p. 405.
[2] *Inst.* iii. 20, 6; Gaius, *Inst.* iii. 127.
Nov. 134, 8.
French, *cautionnement.*
[5] See *ante*, p. 348.
[6] See *ante*, p. 351.

CHAPTER XIV

Extinction of Obligations [1]

An obligation is properly extinguished or ended by what is known as "solution" (*solutio*) or actual performance; the term *solutio* signified in the Roman Law the satisfaction of an obligation whatever might be its nature.[2] An obligation may also be terminated without actual solution or performance by reason of some facts or circumstances which either render it ineffectual or invalid, or are regarded as in themselves equivalent to fulfilment. The extinction of an obligation might be effected, according to the Justinianian Law, by solution either (*a*) actual [3] or (*b*) virtual, as by "acceptilation" [4] or discharge, and by prescription or lapse of time.[5]

Section 158.—Actual Solution [6]

The most usual mode of terminating an obligation is by actual performance of what has been undertaken to be done, whether the act is to give some services or to pay money. It was immaterial, according to the Roman Law, who the person might be who actually made the payment; it might be made by the debtor himself, or by another person for him. A debtor was equally freed from his obligation whether he paid the debt himself or another person paid it for him, either with or without his knowledge or consent, and even against his wish,[7] provided that the payment was made in the name or on account of the debtor, and with money of which the person paying had a right to dispose, for otherwise the debtor's obligation would not be solved and he would still

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[1] *Inst.* iii. 29; Gaius, *Inst.* iii. 168-181; Moyle, *Institutes of Justinian*, 4th ed., 459-468; Sandars, *Institutes of Justinian*, 8th ed., 391-398; Mackenzie, *Roman Law*, 7th ed., 277-282; Sohm, *Institutes of Roman Law*, 3rd ed., 433-447; Hunter, *Roman Law*, 4th ed., 626-650; Girard, *Manuel de Droit Romain*, 5th ed., 684-730; May, *Éléments de Droit Romain*, 5th ed., 403-427.

[2] *Dig.* l. 16, 176; cf. *Dig.* xlvi. 3, 54.

[3] *Inst.* iii. 29 pr.; Gaius, *Inst.* iii. 168; *Dig.* xlvi. 3.

[4] *Inst.* iii. 29, 1, 2; Gaius, *Inst.* iii. 169, 170, 172; *Dig.* xlvi. 4, 8, 4; *Dig.* xlvi. 4, 9; *Dig.* xlvi. 4, 18, 1.

[5] See, on "Prescription of Obligations," *ante*, Part III., Section 83, p. 240.

[6] See references in note 3, *supra*.

[7] This was on the principle that a person may have his position made better but not worse without his consent (*Dig.* iii. 5, 39).

remain liable. Payment by or on behalf of the debtor had the effect of releasing any sureties there might be for the debt, just as payment by a surety loosed the obligations of both himself and the principal debtor to the creditor.[1]

In certain cases solution of an obligation implies the performance of particular acts. Such obligations were said to be *ad factum praestandum;* they are often dependent upon the possession and employment of special skill and ability, in which cases the creditor was entitled by the Roman Law to refuse performance from any one but his debtor.[2]

A creditor was not bound to accept payment by instalments, or in any way other than full payment at the time, place, and in the manner agreed upon, unless there was an express agreement upon the matter,[3] or there were certain special circumstances in which the Praetor might compel the creditor to accept a partial payment.[4]

In order that solution should be effectual it must be made either to the creditor himself or to some person properly authorised by him, or to the creditor's tutor or curator, or to the pupil creditor himself if authorised to receive it. In the general case only the creditor himself, or his heirs, or some one authorised by them, could accept payment,[5] unless some other person had been specially mentioned in the contract.[6] A debtor, however, would be freed of his obligation if he made payment to the agent of his creditor in excusable ignorance of the fact that the creditor had revoked the authority of his agent,[7] and a debtor might even be freed by reason of a *bona-fide* payment to a *negotiorum gestor*.[8]

If performance should have become impossible through the fault of the debtor, he was liable in damages to the creditor; he was bound to act in all cases as a *diligens paterfamilias* or with reasonable care in all the circumstances.[9] But if he was not in fault by reason of the failure to exercise reasonable care, and performance (*solutio*) was rendered impossible through accident (*casu*), the obligation was extinguished *ipso facto* and there was no further liability; it was, however, essential that the impossibility should have arisen by chance (*casu*).[10]

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[1] Cf. *Inst.* iii. 29 pr.; *Dig.* xlvi. 1, 66; xlvi. 3, 23; xlvi. 3, 53; Gaius, *Inst.* iii. 168.

[2] *Dig.* xlvi. 3, 31. *Cf.* French Civil Code, Art. 1237.

[3] *Dig.* xxii. 1, 41, 1.

[4] *Dig.* xii. 1, 21; see Hunter, 635.

[5] *Dig.* l. 17, 180.

[6] *Dig.* xlvi. 3, 12, 1.

[7] *Dig.* xlvi. 3, 12.

[8] *Dig.* xlvi. 3, 58 pr.

[9] *Dig.* xlv. 1, 137, 2, 3.

[10] *Dig.* xlv. 1, 33; xlv. 1, 83, 5. See, for examples of "impossibility of performance," Hunter, p. 638; and upon "Impossibility" generally, *ante*, pp. 306 and 314.

SECTION 159.—INDEFINITE PAYMENTS, AND APPORTIONMENT OF PAYMENTS TOWARDS EXTINCTION OF DIFFERENT DEBTS[1]

In those cases where a debtor owed a creditor more than one debt he might specify the particular debt towards the extinction of which the payment was to be applied. If the debtor did not specially appropriate the payment to the extinction of a particular debt it was in such a case indefinite, and the creditor was then bound, according to the Roman Law, to apply the payment towards the extinction of that debt which if he were himself the debtor he would naturally wish to have discharged, or, in other words, that debt which was most burdensome to him.[2] This rule differs from the principle prevailing in certain modern legal systems, such as those of England and of Scotland, to the effect that in such a case the interest of the creditor is primarily of more importance than that of the debtor, and that therefore a creditor is entitled to apply an indefinite payment in whatever way is more favourable to himself; thus he may apply it towards an unsecured, or an insufficiently secured, debt unless by so doing the debtor is put in danger of suffering serious prejudice.

If interest was already due upon the debt the Roman Law required that an indefinite payment should be applied, in the first place towards extinction of the interest, and thereafter the surplus, if any, would go towards the extinction of the principal debt.[3]

SECTION 160.—VIRTUAL SOLUTION

Obligations may be extinguished or terminated by virtual fulfilment, or by some act or circumstance which is regarded as equivalent to fulfilment.

In the Justinianian law virtual fulfilment was operated when there had taken place what was known as (*a*) "compensation" (*compensatio*), (*b*) "novation" (*novatio*), and (*c*) "confusion" (*confusio*); also by (*d*) "acceptilation" (*acceptilatio*), (*e*) *pactum de non petendo*, (*f*) prescription, and (*g*) in certain circumstances, death and *capitis deminutio*.[4]

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[1] *Cf.* French Civil Code, Arts. 1253-1256.

[2] *Dig.* xlvi. 3, 1.

[3] *Code*, viii. 43, 1.

[4] See *Inst.* iv. 6, 30 and 39; Gaius, *Inst.* iv. 41-68; Justinian, *Dig.* xvi. 2; *Code*, iv. 31; Hunter, *Roman Law*, 4th ed., 1017, 1018; Mackenzie, *Roman Law*, 7th ed., 279, 280; Moyle, *Institutes of Justinian*, 4th ed., 556-558; Sohm, *Institutes of Roman Law*, 3rd ed., 441-447; Sandars, *Institutes of Justinian*, 8th ed., 457-459.

(a) *Compensation* (*Compensatio*)

This is otherwise known as "set-off," and it is defined as "the reciprocal extinction of debts between two persons, each of whom is indebted to the other."[1] If both debts are equal each mutually extinguishes the other, but if the debts to be compensated or "set-off" against each other are unequal the lesser debt is extinguished altogether, while the greater debt is diminished by the amount of the lesser. By the law of Justinian "compensation" could be pleaded in any action, whether real or personal, with the exception of the action on deposit, "lest under this pretence anyone should be fraudulently prevented from recovering the thing deposited."[2] Moreover, "compensation" could not be pleaded against a demand for restitution of a thing of which the owner had been illegally deprived.

Not all debts could be compensated or set-off against each other; in order that compensation should operate, the Justinianian law insisted upon certain requisite circumstances, to the effect (1) both debts must be actually exigible or enforceable; consequently a debt that had already prescribed could not be set-off against an existing one;[3] a "natural" obligation, however, although not legally enforceable, could, nevertheless, be set-off against an enforceable "civil" debt;[4] (2) the debts to be compensated must be of the same nature, so that an obligation to do some specific act—as to deliver property—could not be set-off against an obligation to pay money; (3) both debts required to be actually due and payable; therefore compensation was not competent between a debt that could be enforced at once and one that was future, far less merely conditional upon the happening of an uncertain future event; (4) the debts to be compensated required to be both definitely determined and due, or, in other words, they must both be "liquid";[5] a debt is not "liquid" if either its existence or its nature is disputed, unless it is capable of being immediately ascertained and determined.

As a general rule compensation could be pleaded by a person only upon a debt due to himself; but there were certain exceptions to this rule, for an heir could competently set-off, as if it were his own, a debt due to his predecessor, and a surety might set-off a debt due by the creditor to the principal debtor; but the principal debtor, on his part,

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[1] Mackenzie, *ut supra; Dig.* xvi. 2, 1: *Compensatio est debiti et crediti inter se contributio.*

[2] Justinian, *Inst.* iv. 6, 30.

[3] *Dig.* xvi. 2, 14.

[4] *Dig.* xvi. 2, 6.

[5] Cf. *Code*, iv. 31, 14, 1.

was not entitled to set-off against his debt a debt due by the creditor to the surety.[1]

Compensation did not operate *ipso jure*, but only when the debtor directly pleaded it in reply to a demand made by the creditor for the performance of the debtor's obligation; it then operated in either of two ways, for either the parties might mutually agree that their reciprocal obligations should be extinguished either wholly or partially, or the Court might give effect to the debtor's plea in defence; in the former case there would be what is known as "voluntary compensation," while in the latter case it was "judicial."[2] If the debtor's defence of compensation or set-off was sustained it operated retrospectively, or backwards, and consequently interest would cease to run upon the two debts from the time when they began to co-exist.

(b) *Novation* (*Novatio*)[3]

This signifies the extinction of an existing obligation by the creation of another new one.[4] It was effected in three different ways, namely—(*a*) by the substitution of a new creditor, with the consent of both parties; (*b*) by the substitution of a new debtor; or (*c*) by the substitution of a new contract between the same parties.[5]

Every kind of contract could be superseded by novation, but the new contract required to be either "literal" (*litteris*)[6] or by stipulation (*stipulatione*); since, however, the literal contract was obsolete by the time of Justinian,[7] the only method of novation dealt with in the *Institutes*[8] is a novation by means of a stipulation; apart from that fact, however, stipulations had been for long the almost invariable instrument of novation and is alone usually referred to by the jurists.[9] The obligation superseded required to be actually existing at the time, but it was immaterial whether it was civil, praetorian, or natural;[10] it was necessary, however, that the superseding stipulation should be binding either civilly or naturally.

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[1] *Dig.* xvi. 2, 5.

[2] See Mackenzie, *ut supra*, 280, note 2.

[3] Justinian, *Inst.* iii. 29, 3; *Dig.* xlvi. 2; *Code*, viii. 42; Gaius, *Inst.* iii. 176-179. See also Hunter, 626-632; Mackenzie, 280, 281; Sandars, 396, 397; Moyle, 464-466. *Cf.* French Civil Code, 1271-1281.

[4] *Dig.* xlvi. 2, 1 pr.

[5] *Cf.* French Civil Code, Art. 1271.

[6] See *Inst.* iii. 21; also *ante*, p. 296.

[7] *Cf.* Hunter, *ut supra*, 631.

[8] *Inst.* iii. 29, 3.

[9] Cf. *Dig.* xlvi. 2, 1, 1.

[10] *Dig.* xlvi. 2, 1, 1.

The substitution of a new debtor for the former one was generally known as "delegation" (*delegatio*) and the new debtor was called the *expromissor*. "Delegation," or the substitution of a new debtor, might take place either with or without the consent of the former debtor,[1] but the consent of the creditor was essential in order to avoid the risk of an insolvent debtor being foisted upon him.[2]

Strictly speaking, *delegatio* signified the process by which a new debtor was substituted for the original one, if the substitution took place with his consent; in such a case the new debtor was called *delegatus*; if, however, the substitution was without the consent of the original debtor the process was known as *expromissio*, and the new debtor was styled the *expromissor*; but these terms came in time to be used in a wide general sense with reference to the new debtor and without any necessary implication that the original debtor was not a consulting party.[3] The supervening insolvency of the substituted debtor (*delegatus*) involved no liability on the part of the original debtor unless he had specially guaranteed the credit of the new debtor.[4]

Novation was not presumed, and, therefore, unless an intention to novate and thereby to extinguish the former obligation was clearly expressed, the new obligation was regarded merely as either corroborative of or additional to the former one.[5]

The extinction of an obligation by "novation" involved the extinction of all obligations that were accessory to the principal contract, such as a surety.

(c) *Confusion* [6]

An obligation was said to have been extinguished "by confusion" (*confusione*) when the rights of both debtor and creditor became merged in the same person upon either a universal or a singular title,[7] for one cannot be a debtor to himself; thus the debtor might succeed as heir to the creditor, or the creditor might succeed as heir to the debtor, or a third party might succed as heir to both the creditor and the debtor.[8]

The confusion of an obligation in the person of the principal debtor

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[1] *Cf.* French Civil Code, Art. 1274.
[2] *Code*, viii. 42, 1; viii. 42, 6. See Hunter, *ut supra*, 632.
[3] Cf. *Dig.* xiii. 7, 10; Sandars, *ut supra*, 396.
[4] *Cf.* French Civil Code, Art. 1276.
[5] *Inst.* iii. 29, 3; *Dig.* xlvi. 2. *Cf.* French Civil Code, Art. 1273.
[6] See Hunter, *ut supra*, 649 and 748; Mackenzie, *ut supra*, 281.
[7] See on "Universal" and "Singular" Succession, *ante*, Part III., Section 67, p. 202.
[8] *Dig.* xlvi. 1, 71 pr.; xlvi. 3, 95, 2; *Code*, iv. 16, 5.

had the effect of releasing all obligations that were accessory to the principal one, such as sureties; but, on the other hand, the obligation was not extinguished by the confusion of the creditor in the person of the surety.[1]

(d) *Acceptilation* (*Acceptilatio*)[2]

This, in its general sense, signified the discharge of an obligation by a creditor without insisting upon payment or performance by the debtor. Acceptilation was an "imaginary solution" (*imaginaria solutio*),[3] for, except in the case when the obligation had been created *verbis*, it did not strictly operate as a release from the obligation but was held as merely implying, in all cases, an informal pact or agreement not to sue upon it, which would ground an *exceptio* or defence against the creditor.

Acceptilatio was, strictly, only applicable to obligations that had been created by means of a stipulation, and it was the discharge of an obligation that had been created in that way, by means of a solemn declaration on the part of the creditor, in answer to a solemn formal question put to him by the debtor, that he held the original stipulation as fulfilled or satisfied.[4] The jurists, however, ultimately extended the *acceptilatio* to every kind of contract, and it came to be regarded as a stipulation which had the effect of operating a novation of the former contract by the substitution of a new agreement not to sue upon it. What was known in the Roman Law as the "Aquilian Stipulation" (*stipulatio Aquiliana*) was a general form of stipulation devised by Aquilius Gallus, who was a praetor and a colleague of Cicero, in B.C. 65, which was competent to convert by novation any obligation, however it might have been created, into one arising out of a stipulation (*ex stipulatione*) and which could be extinguished thereafter by a formal *acceptilatio*.[5]

In the later law even a partial release of an obligation might be effected by *acceptilatio* if the obligation was a divisible one; if, however, the obligation was indivisible an *acceptilatio* was void if it did not include the whole obligation.[6]

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[1] *Dig.* xlvi. 3, 43; xlvi. 1, 21, 3.

[2] Justinian, *Inst.* iii. 39, 1, 2; *Dig.* xlvi. 4; ii. 15, 4; Gaius, *Inst.* iii. 169-172; *Code*, viii. 44. See also Poste's *Gaius*, 4th ed., 394; Hunter, *ut supra*, 639-641; Sandars, *ut supra*, 393, 394; Moyle, *ut supra*, 462-464.

[3] Justinian, *Inst.*, *ibid.*; Gaius, *Inst.* iii. 169.

[4] Cf. *Inst.* iii. 29, 1.

[5] See *Inst.* iii. 29, 2. See upon the Aquilian Stipulation and its terms, Sandars, *Institutes of Justinian*, 8th ed., 394; Poste's *Gaius*, 4th ed., 394; Moyle, *Institutes of Justinian*, 4th ed., 463; Hunter, *Roman Law*, 4th ed., 639-641.

[6] Cf. *Dig.* xlvi. 4, 13, 1. See for examples of the distinction between divisible and indivisible obligations, Hunter, *ut supra*, 640, 641.

(e) *Pactum de non petendo*

There was a form of agreement standing midway between *acceptilatio* in the strict sense, and the discharge of an obligation in the general sense of an acknowledgment of the fact that payment or performance of the obligation has actually taken place; this was an informal agreement known as the *pactum de non petendo*, by which the creditor undertook that he would not insist upon performance of the obligation by the debtor. From one point of view such an agreement was wider in its application than *acceptilatio*, because it could apply to all obligations however they might have been constituted; but from another point of view it was of a much more restricted nature than *acceptilatio*, inasmuch as the creditor did not, by it, declare that he held the debt as paid or the obligation as satisfied, but merely declared that he would not insist upon payment or performance. Such an agreement, therefore, was thus not a release from, or an extinction of the obligation, which still continued to subsist,[1] but merely constituted a defence (*exceptio*) available to the debtor in the event of the creditor insisting upon performance; in other words, such an agreement operated merely *ope exceptionis* and not *ipso jure*.[2]

If the agreement not to sue was personal (*in personam*) it afforded a defence (*exceptio*) only to the particular person in whose favour the undertaking was given,[3] but if the pact was *in rem* it was available both to the debtor and to his sureties and representatives.[4]

The "consensual" contracts[5] being constituted by consent alone and not by reason of the employment of any form of words, might be extinguished by mere contrary consent (*contraria voluntas*) without any performance by either party, so long as neither party had done anything towards performance of his undertaking, or, in other words, so long as matters were still entire (*re integra*).[6]

> In modern practice the Roman form of *acceptilatio* is not employed; but all debts and obligations, however they may have been created, may be extinguished by a simple agreement between the creditor and debtor.[7]

---

[1] An informal pact could not, in any case, supersede a civil obligation although it might extinguish a natural one *ipso jure* (*Dig.* xlvi. 3, 95, 4; Gaius, *Inst.* iv. 116). Contrary to the usual rule, moreover, an informal pact could extinguish the actions *injuriarum* and *furti* (*Dig.* ii. 14, 17, 1).

[2] See upon the *Pactum de non petendo*, Justinian, *Inst.* iv. 13, 3; Gaius, *Inst.* iv. 116; Hunter, *ut supra*, 642; Sohm, *Institutes of Roman Law*, 3rd ed., 440.

[3] *Dig.* ii. 14, 7, 8; ii. 14, 57, 1.

[4] Justinian, *Inst.* iv. 14, 4; *Dig.* ii. 14, 27, 2. *Cf.* Mackenzie, *ut supra*, 282, note 5.

[5] See *ante*, p. 364 *et seq.* (Chapter IX.).

[6] Justinian, *Inst.* iii. 29, 4; *Dig.* xlvi. 3, 80; xviii. 5, 5, 1.

[7] *Cf.* Mackenzie, *ut supra*, 283.

(f) *Prescription*

In certain cases prescription, or mere lapse of time, either extinguished the obligation or precluded action from being taken upon it, and thus was equivalent to a discharge.[1]

(g) *Death, and Capitis Deminutio*

Death and *capitis deminutio* might both also operate extinction of an obligation in certain circumstances, such as, for example, when the obligation had arisen through delict, or where the obligation was one based upon the personal skill or qualifications of the debtor. In the general case, however, death did not operate the extinction of "civil" obligations, and these consequently transmitted to the debtor's heirs, who became liable for them; *capitis deminutio* or loss of legal status[2] had the effect of extinguishing "civil" obligations, as such, but thereafter they continued to subsist as "natural" ones;[3] obligations based upon delict, however, were not extinguished by *capitis deminutio*.[4]

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[1] See Prescription, *ante*, Part III., Chapter V., p. 234, and specially as extinctive of obligations and actionable rights, *ante*, Section 83, p. 240.

[2] See on *capitis deminutio*, *ante*, Part II., p. 72 *et seq.*

[3] See also *ante*, Part II., Section 8, p. 77.

[4] See also *ante*, p. 77.

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